

SALES AND CONTRACTS IN  
EARLY ISLAMIC COMMERCIAL LAW

BY

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IN THE NAME OF GOD, THE MOST  
COMPASSIONATE, THE MOST MERCIFUL

PREFACE AND ACKNOWLEDGEMENT

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This study was made possible, firstly by the study award (from 26th September 1982 to 25th March 1986) under the Academic Staff Training Scheme Programme (Sekim Latihan Akademik Bumiputra) which was granted to me by the University of Malaya, where this writer is employed as lecturer and secondly by the scholarship awarded by the Public Service Department, Malaysia.

In relation to some technical aspects of this work, the separate table of transliterations and list of abbreviations are given on pp. xii-xiv and pp. xv-xx respectively. Further, it is very important to mention here that it was extremely difficult for the writer to pronounce the formula, which is normally rendered in English as "peace be on him" after mentioning the Prophet Muḥammad and the other prophets, and "God be pleased with them" and "God have mercy on them" in respect of the Companions or the Successors and other venerable personalities in Islam. The difficulty of including these formulae is evident because they would have sometimes appeared several times in a single page. In consequence of that, these formulae may be regarded as understood and may be taken for granted.

\* \* \* \* \*

The writer of this work is conscious both as a student and as a Muslim of manifesting his unqualified awareness of man's inability and weaknesses in his search for truth and knowledge, unless assisted and willed by God, and to round off this preface and acknowledgement I recite the normative statement, as a maxim, with which the classical Muslim 'ulamā' concluded their written academic works: This written work is accomplished only by the grace of God and He knows best what is true and right. All gratitude and praise be only to Him.

'Abdullāh 'Alwī Ḥajī Ḥassan

Edinburgh,

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## ABSTRACT

This study deals with the early development of Islamic contractual and commercial law.

The Introduction presents the Arabian commercial background during the time prior to the advent of Islam to show the historical sequence and the economic phenomena, especially commercial, of pre-Islamic Arabia, which gave rise to the development of Islamic commercial law. In this part, explanations are also made on the basis of the Qur'ānic injunctions on commerce and trade and the commercial life of Muslims. Theoretical issues concerning the concept of sale and the scope of this study are also discussed.

Chapter I deals with moral and ethics in trade. This chapter includes the encouragements, discouragements and prohibitions in commercial transactions.

Chapter II gives the management and modes of the market and its classifications and voidable contracts.

Chapter III, risk (al-gharar) in sale and permissible sales are discussed. It comprises (of) an inquiry into risk in sale, including the definition of al-gharar (risk in sale), the rules to elude al-gharar and the gharar transactions. This chapter also examines the permissible sales, i.e. sale by advance (al-salam) and sale of fresh dates by estimation (bay' al-'arāyā).

Chapter IV covers the restrictions on sales. It is restricted to a discussion of sale of excess water and



other communal properties, exchange of animals for animals on credit, exchange of precious metals and foodstuffs on credit, sale by an agent and the capital specified when paying and sale by a written document (al-bay' bi al-ṣakk).

In Chapter V, partnership in business transactions and pre-emption (al-shuf'a) are dealt with. It analyses al-muḍāraba (dormant partnership) and its quasi-contracts, al-sharika (mercantile partnership) and al-shuf'a (pre-emption).

Chapter VI studies loans, deposit (al-wadī'a) and interdiction (al-ḥajr), in particular al-qard (loan of fungible objects for consumption), al-'āriyya (loan of non-fungible commodities), al-wadī'a (deposit), al-ḥajr (interdiction) and their early legal developments.

In Chapter VII, the early legal development of suretyship (al-kafāla) and pledge or security (al-rahn) are discussed and examined.

Chapter VIII discusses the contract of hiring (al-ijāra) and pay in return for work (al-ju'āla), focusing on the embryonic evolution of their legal expansions.

Finally, Chapter IX covers juridical settlement of disputes, amicable settlement (al-ṣulḥ) and extinction of an obligation which includes al-ḥawāla (assignment of debts) and sale by bill of exchange (bay' bi al-suftaja).

The conclusion summarizes and resolves the various discussions in each chapter of the thesis.

A NOTE ON TRANSLITERATION AND ITS TABLE

There is no universally recognized system of transliterating Arabic into European alphabet. In this work, the transcription system used by the Department of Islamic and Middle Eastern Studies, University of Edinburgh has been adopted. Therefore, the following characters are used:

Consonants

<u>Arabic Letter</u>	<u>Name and Transcription</u>
الف	alif : a, ' ( <u>hamza</u> )
ب	bā' : b
ت (omitted at the end of the word. But when the ā occurs in the first member of an <u>idāfa</u> (or genitive) construction, it is represented as t)	tā' : t
ث	thā' : th
ج	jīm : j instead of dj
ح	ḥā' : ḥ
خ	khā' : kh
د	dāl : d
ذ	dhāl : dh
ر	rā' : r
ز	zāy : z
س	sīn : s
ش	shīn : sh



Arabic Letter

Name and Transcription

ص	ṣād : ṣ
ض	ḍād : ḍ
ط	ṭā' : ṭ
ظ	ẓā' : ẓ
ع	'ayn : ' (inverted apostrophe)
غ	ghayn : gh
ف	fā' : f
ق	qāf : q instead of k
ك	kāf : k
ل	lām : l
م	mīm : m
ن	nūn : n
هـ	hā' : h
و	wāw : w
ي	yā' : y
ال	al

Vowels

Long:

ا  
آ  
إ  
أ  
و  
ي

ā, carrier of the initial vowel

ū

ī

و

ي

Short:	<u>اَ</u>	(fatḥa)	a } u } i }	omitted at the end of the word
	<u>و</u>	(ḍamma)		
	<u>ِ</u>	(kasra)		

Doubled:

اَيَّ	iiyy
وَيَّ	uww

Diphthongs:

أَو	aw
أَي	ay

LIST OF ABBREVIATIONS

The following is a list of the abbreviations used for the works most frequently referred to in footnotes.

<u>Ah. M.</u>	Aḥmad b. Ḥanbal, <u>al-Musnad</u> .
<u>A'lam</u>	Ibn Qayyim al-Jawziya, <u>A'lām al-Muwaqqi'īn</u> .
<u>Amali</u>	al-Shaybānī, <u>Kitāb al-Amālī</u> .
<u>Amr.</u>	al-Muzanī, <u>Kitāb al-Amr wa al-Nahy</u> .
<u>Amw.</u>	Abū 'Ubayd, <u>Kitāb al-Amwāl</u> .
<u>Asl.</u>	al-Shaybānī, <u>al-Aṣl (Kitāb al-Buyū' wa al-Salam)</u> .
<u>Ath.</u>	Abū Ḥanīfa, <u>Kitāb al-Āthār</u> . The version of Abū Yūsuf.
<u>Azr.</u>	al-Azraqī, <u>Akḥbār Makka</u> .
<u>Back.</u>	J. Schacht, ' <u>Pre-Islamic Background and Early Development of Jurisprudence</u> ', in <u>Law in the Middle East</u> .
<u>Bukh.</u>	al-Bukhārī, <u>al-Jāmi' al-Ṣaḥīḥ</u> .
<u>C. Com.</u>	N.J. Coulson, <u>Commercial Law in the Gulf States - The Islamic Legal Tradition</u> .
<u>C. Conf.</u>	N.J. Coulson, <u>Conflicts and Tensions in Islamic Jurisprudence</u> .
<u>C. His.</u>	N.J. Coulson, <u>A History of Islamic Law</u> .
<u>Da.</u>	al-Dārimī, <u>Sunan</u> .

<u>Daraq.</u>	al-Daraqutni, <u>Sunan.</u>
<u>Dau.</u>	Abū Dā'ūd, <u>Sunan.</u>
<u>EI</u> <sup>1</sup>	<u>The Encyclopaedia of Islam</u> (1st Edition).
<u>EI</u> <sup>2</sup>	<u>The Encyclopaedia of Islam</u> (2nd Edition).
<u>Faiq.</u>	al-Zamakhsharī, <u>al-Fā'iq fī Gharīb al-Hadīth.</u>
<u>Fata.</u>	Ibn Taymiyya, <u>Majmū' al-Fatāwa al-Kubrā.</u>
<u>Ham. Sira</u>	Muhammad Hamidullah, <u>Sīrat Ibn Ishāq.</u>
<u>Han. M.</u>	al-Imām Abū Ḥanīfa, <u>Musnad.</u>
<u>Haq.</u>	Ziaul Haque, <u>Landlord and Peasant in Early Islam.</u>
<u>Haz. I.</u>	Ibn Ḥazm, <u>al-Iḥkām fī Uṣūl al-Aḥkām.</u>
<u>Haz. M.</u>	Ibn Ḥazm, <u>Kitāb al-Muḥallā.</u>
<u>Hisb.</u>	Ibn Taymiyya, <u>al-Ḥisba fī al-Islām.</u>
<u>Huj.</u>	al-Shaybānī, <u>Kitāb al-Hujja 'alā Ahl al-Madīna.</u>
<u>IH.</u>	Ibn Hishām, <u>al-Sīra al-Nabawiyya.</u>
<u>Ikhtilaf</u>	Abū Yūsuf, <u>Ikhtilāf Abi Ḥanīfa wa Ibn Abī Laylā.</u>
<u>Integ.</u>	W. M. Watt, <u>Islam and the Integration of Society.</u>
<u>Intro.</u>	J. Schacht, <u>An Introduction to Islamic Law.</u>
<u>IS.</u>	Ibn Sa'd, <u>Kitāb al-Ṭabaqāt al-Kubrā.</u>

- Isa. Ibn Ḥajar al-‘Asqalānī, Kitāb al-Iṣāba fī Tamyīz al-Ṣaḥāba.
- I. Shu. Ibn Shubbah, Kitāb Tārīkh al-Madīna al-Munawwara.
- Ist. in Isa. Ibn ‘Abd al-Barr, Kitāb al-Istī‘āb fī Ma‘rifat al-Aṣḥāb, on the margin of Ibn Ḥajar al-‘Asqalānī's Kitāb al-Iṣāba fī Tamyīz al-Ṣaḥāba.
- Jam. Al-Qurṭubī, al-Jāmi‘ li Aḥkām al-Qur‘ān.
- Jaz. ‘Abd al-Raḥmān al-Jazīrī, Kitāb al-Fiqh ‘alā al-Madhāhib al-Arba‘a.
- J. Ma. Abū Ḥanīfa, Jāmi‘ Masānīd al-Imām al-A‘ẓam. Compiled by Muḥammad b. Maḥmūd al-Khwārizmī.
- Kanz. ‘Alā’ al-Dīn ‘Alī al-Muttaqī al-Hindī, Kanz al-‘Ummāl.
- Kas. al-Kasānī, Kitāb Badā’i’ al-Ṣanā’i’ fī Tartīb al-Sharā’i’.
- Khar. Abū Yūsuf, Kitāb al-Kharāj.
- Lan. E.W. Lane, Arabic-English Lexicon.
- Lis. Ibn Manẓūr, Lisān al-‘Arab.
- Mab. al-Sarakhsī, al-Mabsūt.
- Mecca W.M. Watt, Muḥammad at Mecca.
- Medina W.M. Watt, Muḥammad at Medina.
- M. in Um. al-Muzanī, Kitāb al-Mukṭaṣar, in al-Shāfi‘ī's Kitāb al-Umm, VIII.



<u>Mud.</u>	Sahnūn b. Sa'īd al-Tanawkhī, <u>al-Mudawwana al-Kubrā li al-Imām</u> <u>Mālik b. Anas.</u>
<u>Muf.</u>	Jawād 'Alī, <u>al-Mufaṣṣal fī Tārīkh</u> <u>al-'Arab qabl al-Islām.</u>
<u>Muhab</u>	Muḥammad b. Ḥabīb, <u>Kitāb al-Muḥabbar.</u>
<u>Mus.</u>	Muslim b. al-Ḥajjāj al-Qushayrī, <u>al-Jāmi' al-Ṣaḥīḥ.</u>
<u>Mus. in Um.</u>	al-Shāfi'ī, <u>Kitāb al-Musnad</u> , in al-Shafi'ī's <u>Kitāb al-Umm</u> , VIII.
<u>Muw. Sh.</u>	Mālik b. Anas, <u>al-Muwatṭa'.</u> The version of Muḥammad b. al-Ḥasan al-Shaybānī.
<u>Muw. Y.</u>	Mālik b. Anas, <u>al-Muwatṭa'.</u> The version of Yaḥyā b. Yaḥyā al-Laythī.
<u>Nasa.</u>	al-Suyūṭī, <u>Sharḥ Sunan al-Nasā'ī.</u>
<u>Naw.</u>	al-Nawawī, <u>Minhāj al-Ṭālibīn.</u>
<u>Naw. Mus.</u>	al-Nawawī, <u>Sharḥ Ṣaḥīḥ Muslim.</u>
<u>Niha.</u>	Ibn al-Athīr, <u>Kitāb al-Nihāya fī</u> <u>Gharīb al-Ḥadīth wa al-Athar.</u>
<u>Orig.</u>	J. Schacht, <u>The Origins of Muḥammadan</u> <u>Jurisprudence.</u>
<u>Q.</u>	al-Qur'ān (after Q. first figure shows the number of <u>sūra</u> and second figure shows the verse, e.g. Q., 2:40).
<u>Qas.</u>	al-Qaṣṭalānī, <u>Irshād al-Sārī li</u> <u>Sharḥ Ṣaḥīḥ al-Bukhārī.</u>
<u>Qud.</u>	Ibn Qudāma, <u>al-Mughnī.</u>

<u>Risa.</u>	al-Shāfi'ī, <u>al-Risāla.</u>
<u>Sab.</u>	al-Sayyid Sābiq, <u>Fiqh al-Sunna.</u>
<u>San.</u>	al-Ṣan'ānī, <u>al-Muṣannaf.</u>
<u>Shaw.</u>	al-Shawkānī, <u>Nayl al-Awtār.</u>
<u>Shur.</u>	al-Ṭaḥāwī, <u>Kitāb al-Shurūṭ al-Kabīr.</u>
<u>Siyar</u>	al-Sarakhsī, <u>Sharḥ al-Siyar al-Kabīr</u> of al-Shaybānī.
<u>Taha.</u>	al-Ṭaḥāwī, <u>Sharḥ Ma'ānī al-Āthār.</u>
<u>Tah. Adh.</u>	al-Ṭaḥāwī, <u>Kitāb Adhkār al-Ḥuqūq wa</u> <u>al-Ruhūn min al-Jāmi' al-Kabīr fī</u> <u>al-Shurūṭ.</u>
<u>Tahanawī</u>	al-Tahānawī, <u>Kitāb Kashshāf Iṣṭilāḥāt</u> <u>al-Funūn.</u>
<u>Taj.</u>	al-Zubaydī, <u>Tāj al-'Arūs.</u>
<u>Tanwir</u>	al-Suyūṭī, <u>Tanwīr al-Ḥawālik Sharḥ</u> <u>'alā Muwaṭṭā' Mālik.</u>
<u>Tar.</u>	al-Shāfi'ī, <u>Tartīb Musnad al-Imām</u> <u>al-Shāfi'ī.</u>
<u>Tay.</u>	al-Ṭayālisī, <u>Musnad.</u>
<u>T. Ikh.</u>	al-Ṭabarī, <u>Kitāb Ikhtilāf al-Fuqahā'.</u>
<u>Tir.</u>	al-Tirmidhī, <u>Sunan.</u>
<u>T.J.</u>	al-Ṭabarī, <u>Jāmi' al-Bayān 'an Ta'wīl</u> <u>Āi al-Qur'ān.</u>
<u>T.Ta.</u>	al-Ṭabarī, <u>Tārīkh al-Rusul wa al-</u> <u>Mulūk.</u>
<u>Um.</u>	al-Shāfi'ī, <u>Kitāb al-Umm.</u>
<u>Umd.</u>	al-'Aynī, <u>'Umdat al-Qārī', Sharḥ</u> <u>Ṣaḥīḥ al-Bukharī.</u>

- UP. A.L. Udovitch, Partnership and Profit in Medieval Islam.
- Usul Ibn al-Athīr, Jāmi' al-Uṣūl fī Aḥādīth al-Rasūl.
- Waq. al-Wāqidī, Kitāb al-Maghāzī.
- Yaq. Yāqūt b. 'Abd Allāh, Kitāb Mu'jam al-Buldān.
- Watha'iq M. Hamidullah, al-Wathā'iq al-Siyāsiyya.
- Y. Yahyā b. Ādam, Kitāb al-Kharāj.
- Zad. Ibn Qayyim al-Jawziyya, Zād al-Ma'ād.
- Zur. al-Zurqānī, Sharḥ al-Zurqānī 'alā Muwattā' al-Imām Mālik.

## INTRODUCTION

This thesis will attempt to examine Islamic commercial law, or the law of contractual obligation, as it developed during the time of the Prophet, the Companions and the Successors.<sup>1</sup> In assessing such a subject it will be useful, where possible, to analyse some aspects which have not been inclusively discussed in the main chapters. Such aspects are as follows:

### I

#### The Arabian commercial background in pre-Islamic times

This introduction has the limited aim of drawing attention to those features of the background of Arabia<sup>2</sup> which are most important for a proper understanding of what was involved in pre-Islamic commercial practice and what elements came from outside. The survey is made on the sixth and the seventh century of Arabia, in particular Mecca and Medina.

Mecca and Medina were regarded as two islands in the waterless steppes and desert which had close economic ties with the nomads. In these two cities, the inhabitants

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1. For the names of the Companions, the Successors and the early jurists, infra Appendix, pp. 504-512.
  2. Arabia here ~~includes~~ includes al-Hijāz, the Najd, al-Shām (Syria), 'Irāq, Yemen and the surrounding countries.



were descendants of nomads who still preserved their ancestors' habits. Therefore, some considerations of the desert life should be looked into.

In general, the nomadic life of the pre-Islamic Arabs depended mainly on stock breeding of the camel. The nature of dry lands, especially in summer in most parts of the country, required them to follow a migratory life. The nomads were dependent, for watering their animals and for their own consumption, on wells which were found in the oases, along with milk and dates. Meat and cereals were consumed occasionally. Some of the nomads relied on the settled lands. Merchants and agriculturalists paid a desert tribe for the protection of their herds and homesteads and for the secure passage of the caravans from any brigandry or robbery which frequently happened. Such an act was not regarded as a crime. From such incomes, they were able to enjoy some of the civilized products of other places.

The oases produced dates as the chief crop, while cereals were predominant in the mountainous places, like al-Ṭā'if.<sup>1</sup> Yathrib (Jathrippa of Ptolemy and Stephan Byzantinus, Jthrb in Minean and Ythrb in Sabea)

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1. Al-Ṭā'if was a place where the tribe of Thaqīf lived. It was situated twelve farsakh (plural farāsikh. A farsakh is three Hāshimi miles) from Mecca. See Yaq., III, p. 495; Lan., II, p. 2369.



inscriptions), or later known as Medina<sup>1</sup> at the time of the Prophet, was a flourishing prominent city with intensive cultivation and groups of oases. The city became an important centre for agriculture.<sup>2</sup> At Khaybar,<sup>3</sup> there were many Jewish agricultural colonies at this time. However, in Medina, the Jewish community represented the commercial life in the city. Some of them were smiths. Probably, some of the Medinans sent

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1. This city lay some three hundred miles north of Mecca. See Fr. Buhl, EI<sup>1</sup>, vol. III, p. 83.  
Hitti, History of the Arabs (London, 1985), p. 104. In fact, the Prophet proclaimed Medina a ḥaram and established in Medina a free trade market without any tax being charged on the traders. See Abū al-Ḥasan Aḥmad b. Yahyā al-Balādhurī, Futūḥ al-Buldān, ed. Riḍwān Muḥammad Riḍwān (Beirut, 1403/1983), pp. 22 and 28.
2. Hitti, op. cit., p. 104; Muf., VII, pp. 311-14.
3. Khaybar is six marḥalas (plural marāḥil). A marḥala is the space which the traveller journeys in about a day) to the north-east of Medina. See Umd., XI, p. 232. Cf. Yaq., II, pp. 503-04; Lan., I, p. 1055.

their caravans to various countries in the north, especially trading foodstuffs.<sup>1</sup> They were also involved in money-lending with interest to foreign businessmen.<sup>2</sup> The Yemen or Arabia Felix, on the other hand, was a fertile agricultural country where man-made dams and irrigation had been used from early periods. The Yemen is supposed to have been the original home of the Semites.<sup>3</sup>

Mecca,<sup>4</sup> was a busy and wealthy city, set amidst barren rocks, almost monopolizing the entrepôt trade between the Indian Ocean and the Mediterranean.<sup>5</sup> This probably happened after a period when the ancestors of the Meccans combined small trading with the life of nomadism.<sup>6</sup> But according to al-Ṭabarī, when once the Meccans were stricken with drought and famine, Ḥāshim b. 'Abd Manāf, the great-grandfather of the

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1. Integ., p. 14.

2. Muf., VII, pp. 311-12.

3. Mecca, p. 2.

4. According to the geographer Ptolemy, this city was called Macoraba in his time. See H. Lammens, EI<sup>1</sup>, vol. III, p. 437. But according to Hitti, Mecca originated from Sabeian Makuraba which means sanctuary. This sanctuary made al-Ḥijāz as a whole the most important religious centre in Arabia. See Philip K. Hitti, op. cit., pp. 101 and 103.

5. H.A.R. Gibb, Islam (Oxford, 1980), p. 17.

6. Integ., p. 6.

Prophet, travelled to Palestine where he bought some flour and brought it back to Mecca. He was the first merchant to establish the practice of two trade journeys for Meccans; the trade-journey in winter (to al-Yaman) and the journey (to al-Shām or Syria) in summer.<sup>1</sup>

The Meccan merchants, the Quraysh, had not taken their trade activities beyond the boundaries of the city until Hāshim went to Syria and its rulers granted to him a letter of safe conduct and capitulation for the merchants and their merchandise, i.e. the permission for free passage of their caravans, to Syria,<sup>2</sup> or possibly for lessening of tariff controls in order to secure foreign markets for themselves. Later, 'Abd Shams b. 'Abd Manāf secured the charter from the Abyssinian rulers. Nawfal b. 'Abd Manāf got the charters from the rulers or the Chosroes (al-Akāsira) of 'Irāq and Fars and 'Abd al-Muṭṭalib b. 'Abd Manāf obtained similar charters from the rulers of al-Himyar and al-Yaman.<sup>3</sup> They also got ilāf (the pact of security in their tribal areas) from the chiefs of the tribes in each respective country.<sup>4</sup> Later, Quraysh developed

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1. IS., I, pp. 75-80; T.Ta., II, p. 252.

2. T.Ta., II, p. 252.

3. Muhab., pp. 162-63; T.Ta., II, p. 252.

4. Muhab., pp. 162-63. Ibn Sa'd uses the term ḥilf for the charter(s), see IS., I, pp. 75-80. Muḥammad b. Ḥabīb uses the word ilāf for the charters and the agreements with the chiefs of the tribes, see Muhab., pp. 162-63. Al-Ṭabarī uses the word 'iṣam and ḥabl to denote the charters, see T.Ta., II, p. 252.



international trade and trade treaties with other countries, which had been established by Banū 'Abd Manāf.<sup>1</sup> By this time, the Arabian peninsula was traversed by these trade routes, especially along its periphery and through its more fertile areas. Such routes connected all trade centres in the region.<sup>2</sup>

The existence of a ḥaram (sacred or sanctuary area),<sup>3</sup> a place where men could come in without fear of any hostility and molestation, contributed to the growth of the city of Mecca as a commercial centre. Mecca and the Ka'ba in it had been a great international rendezvous and the crowds of pilgrims which it attracted from almost every Arabian tribe raised its credit and materially contributed to its commercial prosperity. This condition attracted many non-Qu'rashite Arabs to go to Mecca as ḥulafā' (singular

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1. Muhammad Hamidullah, Muslim Conduct of State (Lahore, 1961), p. 102; M.J. Kister, Studies in Jāhiliyya and Early Islam (London, 1980), p. 117 (I).
  2. Ziaul Haq, 'Inter-Regional and International Trade in Pre-Islamic Arabia', Islamic Studies, 7 (3) (Islamabad, September, 1968), p. 224.
  3. Such promulgation of Mecca as a ḥaram was pronounced by the Prophet Ibrāhīm. See Muw. Y., pp. 778-79; Abū al-Ḥasan Aḥmad b. Yahya al-Baladhurī, op. cit., p. 22.



ḥalīf) or confederates. Some of them engaged in commercial enterprises.<sup>1</sup> This concept of ḥilf (confederation or alliance) allowed Meccan caravans to traverse new areas and new markets and provided Meccan merchants with security in areas where the īlāf did not apply. In addition, the concept of jiwār (neighbourly protection) integrated neighbouring tribes to Meccans.<sup>2</sup> Naturally, Mecca by this time became a neutral city.<sup>3</sup> Trade and commerce in the city of Mecca remained inseparably related to the religious rites, especially the pilgrimage in pre-Islamic times. Many caravans with merchandise poured into Mecca,<sup>4</sup> protected by the established institution of the sacred months and enjoyed free access to the markets,<sup>5</sup> besides the existence of the constituted ḥaram.

Mecca was also assisted by its favourable geographical conditions<sup>6</sup> standing in a most strategic geographical

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1. Mecca, p. 10.

2. Mahmood Ibrahim, 'Social and Economic Conditions in Pre-Islamic Mecca', International Journal of Middle East Studies, 14. (Cambridge, 1982), p. 345.

3. M.J. Kister, op. cit., p. 66 (II). For details on social and economic conditions in pre-Islamic Mecca, see Mahmood Ibrahim, op. cit., pp. 343-58.

4. Cf. E.R. Wolf, 'The Social Organization of Mecca and the Origins of Islam', South-Western Journal of Anthropology (Albuquerque, 1951), pp. 330-77.

5. M.J. Kister, op. cit., pp. 76-77 (II).

6. Mecca, p. 3.

position astride one of the greatest arteries of world trade.<sup>1</sup> It was situated at the extreme end of Asia and Africa and at the cross-roads of routes from Sāssānian 'Irāq and Persia through Hīra and al-Ubulla, or from further East up to China, to Abyssinia, Somaliland, Africa, Byzantine Syria and Trans-Jordan. In the North, to the Yemen or South Arabia, the Indian Ocean in the South or in southwestern direction adjoining the Red Sea and on the northwestern side lie Egypt and southern Europe across the Mediterranean sea.<sup>2</sup>

The nomads, in this time, came to Mecca to find goods which had been brought in from these different places. By the end of the sixth century of the Christian era, Mecca and the Meccans had gained control of the entire trade in the Arabian peninsula and the surrounding regions, besides the existence of other scattered centres for trade.<sup>3</sup> It had won over al-Ṭā'if, which was another centre of long-distance trade, as the leading trading and financial centre.<sup>4</sup> The citizens

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1. Philip K. Hitti, op. cit., p. 6.
  2. H.A.R. Gibb, op. cit., p. 17; Intro., p. 6; Bernard Lewis, The Arabs in History (London, 1984), p. 21; Ziaul Haq, op. cit., pp. 207, 224-25.
  3. In addition to Mecca, 'Ukāz fair (a market situated between Mecca and al-Ṭā'if) was a popular commercial and intellectual rendezvous during this time, see Azr., I, pp. 187-88. For details about the pre-Islamic markets, see Muf., VII, pp. 365-86.
  4. Mecca, p. 3.

of Mecca, during this time, had a certain Arab simplicity in their manners and institutions and acquired a wide knowledge in their intercourse with Arab tribesmen, Romans,<sup>1</sup> Sāssānians and Abyssinian subjects, especially in commercial and diplomatic relations.<sup>2</sup> Among the influential men in Mecca, <sup>there</sup> were able and skilful financiers who were knowledgeable in their speculations and the manipulation of credit and the technique of loans with interest and concerned in any profitable or lucrative commercial undertakings and enterprises anywhere in the region. The financial operations extended not only to the Meccans but also to leading notables of the tribes outside the city as well.<sup>3</sup>

In Mecca, there must have been an elementary institution of archives to preserve treaties or agreements of commerce or alliance. The Dār al-nadwa (Senate or Grand Council), although its authority was purely moral, was also confined to advising, studying, looking ahead and counselling to the merchants' community, the benefit of its various experiences.<sup>4</sup> The Dār al-nadwa was the point of departure for caravans from Mecca.<sup>5</sup> All commercial

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1. Gibb, op. cit., p. 17.

2. Ibid.

3. Mecca, p. 3.

4. Cf. IH., I, p. 119; Abū al-Ḥasan Aḥmad b. Yaḥyā al-Balādhurī, op. cit., p. 64; H. Lammens, EI<sup>1</sup>, vol. III, p. 438.

5. IS., I, p. 70; Muf., VII, p. 290.



taxes were collected by a special office for the purpose. There were also available in the Meccan shops the books for accounts and scales to verify and check payments of all kinds of transactions, not only to weigh goods. Coins were not abundant on the market; they were supplemented by precious metals, ingots of gold and silver and gold dust (tibr). In this case, scales would determine the value. In the more intricate or delicate cases, recourse was had to the services of a professional weigher (wazzān). Capital in the Meccan society enjoyed an active circulation. In addition, the businessmen<sup>1</sup> had an unlimited supply of capital in the transaction of credit. Agents, brokers and the great majority of the population lived on credit or loans. By this time, the contract of dormant partnership (al-muḍāraba) was popularly practised. Any sum of money or capital, even a half dīnār (a nashsh), was invested in this partnership. By virtue of this flexible organization everybody, even the poor person, took his share in trading enterprises and commerce,<sup>2</sup> but the lion's share of the profit would belong to one or two entrepreneurs only.<sup>3</sup>

The denarius aureus (gold coin) of Byzantine and the silver dirām<sup>h</sup> of Persia, drachma of Greece or

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1. Mahmood Ibrahim, op. cit., p. 347.

2. H. Lammens, EI<sup>1</sup>, vol. III, p. 439.

3. Integ., p. 7; cf. Ziaul Haq, op. cit., pp. 227-29.



drachm of the Sāssānians and Himyarites were brought to Mecca.<sup>1</sup> The distinctions or the differences in these coins would be determined by trained money-changers. This caused the difference of standard and the oscillations of exchange. The Byzantine Syrians and Egyptians were among the countries with a gold standard (ahl al-dhahab) and Babylonia was the land of a silver standard (ahl al-wāriq). The Meccans' first article of trade was money. They invested their capital in the organization of large caravans, particularly for Syria and al-Yaman.<sup>2</sup> Further, Mecca was a banking city, which had institutions and customs for this type of transaction and for financing. Usury (ribā) in all its forms with maximum charges of interest was practised during this time.<sup>3</sup> The Quraysh considered it only "a kind of legitimate sale" of letting out capital for rent or loan. This transaction is prohibited and

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1. For details on pre-Islamic gold and silver coins, see Muf., VII, pp. 487-504. These coins, normally worn, roughly engraved and very unequal in form and weight, came from the most varied mints. Only the professional money-changers could determine accurately the standards, values and the definite kinds in circulation. See H. Lammens, EI<sup>1</sup>, vol. III, p. 440.
  2. H. Lammens, EI<sup>1</sup>, vol. III, p. 440; Muf., VII, p. 289.
  3. H. Lammens, EI<sup>1</sup>, vol. III, p. 440; Muf., VII, p. 230.

condemned in the Qur'ān (Q., 2:276).<sup>1</sup>

As a banking centre, in Mecca, businessmen could make payments to many distant places or countries. Mecca was also a clearing house for international trade, thus the business included great trading facilities as well as insurance of the goods on a very dangerous route. The Red Sea passage between Aila and Adulis was the only rival of that route. However, since the decline of Byzantine shipping and the inactivity of Abyssinian merchants in the far north, the Red Sea passage had never emerged as a real threat to Mecca. The greater part of the luxury trade by Byzantium also depended on Mecca, especially during the time of a struggle (604-28) between the Byzantines and the Persians.<sup>2</sup>

In addition, speculation was rampant, on the rates of exchange, the load of a caravan which one tried to purchase, the yield of the harvests and of the flocks and lastly the provisioning of the city. Fictitious associations were formed and sales were contracted on which loans were made. The Meccans or others always took merchandise along with them, even in setting out on a military expedition. Women-folk

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1. T.J., III, p. 103; Jam., III, p. 356; H. Lammens, EI<sup>1</sup>, vol. III, p. 440.
  2. De Lacy O'Leary, Arabia before Muhammad (London, 1927), p. 182. For details of trading by sea-routes, see Muf., VII, pp. 243-84.

also took active parts in mercantile enterprises.<sup>1</sup>

Among the leading businesswomen during this time were Khadīja bint Khwaylid,<sup>2</sup> Asmā' bint Mukharriba, i.e. Abū Jahl's mother, who was a perfume merchant<sup>3</sup> and Hind, the wife of Abū Sufyān, who sold her merchandise among the Kalbis of Syria. Most of the businesswomen had commercial investments in caravan trades.<sup>4</sup>

The organization of caravan trades<sup>5</sup> was the subject of interminable palavers in the public meeting places or others in the city of Mecca and its suburban areas. The caravan carrying mercantile goods was called Laṭīma<sup>6</sup> and a caravan carrying foodstuffs was called rikāb.<sup>7</sup> Its departure and return were events of public interest and concern. The population was associated with the caravan trade. The caravans, while they were en route remained in constant and regular communication with the metropolis through Bedouins met on the journey by special couriers.<sup>8</sup>

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1. H. Lammens, EI<sup>1</sup>, vol. III, p. 440.

2. IH., I, p. 171.

3. Waq., I, p. 89.

4. H. Lammens, EI<sup>1</sup>, vol. III, p. 440.

5. For details, see Muf., VII, pp. 317-64.

6. Lis., XII, p. 543; Taj., IX, p. 60.

7. Qas., IV, pp. 74-75; Taj., I, p. 277.

8. H. Lammens, EI<sup>1</sup>, vol. III, p. 440.



These caravans carried back to Mecca intoxicants, skins and leather, fruit, honey, vegetables and currants<sup>1</sup> from al-Ṭāif, ingots of gold, silver and gold dust (tibr) from Africa. Perfume, rare spices, aromatic gums or frankincense and medical drugs were brought back from Southern Arabia, India or Africa. In addition, silk was brought from China, cloth from Aden, slaves, labourers, mercenary soldiers (the Abyssinians - al-Aḥābīsh)<sup>2</sup> and ivory from Africa. The luxury industrial products, such as cotton, linen or silk stuffs and cloths dyed in vivid purple were, however, brought back from Mediterranean countries, Egypt and Syria and arms, cereals and oil were from Buṣrā and the Sharāt of Syria. All these objects, which were purchased at high prices, were regarded as the luxury of the civilized countries, in the East or the West.<sup>3</sup> Some of these goods found their way to the Graeco-Roman world.<sup>4</sup>

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1. Waq., I, p. 16; Muf., VII, p. 315.

2. According to O'Leary, this employment of hired militia, as the guards, showed that the citizens of Mecca were too busy with commercial life and lost their taste for fighting, see De Lacy O'Leary, op. cit., p. 184. For further discussion on al-Aḥābīsh, see Mecca, pp. 154-57.

3. H. Lammens, EI<sup>1</sup>, vol. III, p. 440; cf. Mud., VII, pp. 232-42 and 307.

4. De Lacy O'Leary, op. cit., p. 182.



All articles, leather, metals, scented woods were not damaged, even though the journeys were very slow. The expenses were restricted to the hire of the animals, the payment of the escorts, the tools, some taxes and presents to the chiefs of the tribes en route.<sup>1</sup> Therefore, with this type of economic organization, maximum profits were possible and reasonable to conceive.

The Meccan caravans, through the Hijāz route, entered Byzantine territory at Ayla, at the head of the Gulf of 'Aqaba and it was the terminus of the road from the Red Sea to Palestine. The caravan, which proceeded to Gaza, the sea-port in the south of Palestine, brought merchandise to other Mediterranean cities and some of it ended at Buṣrā in Syria. In this city, the Meccan caravans handed over their commodities to the buyers

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1. De Lacy O'Leary, op. cit., p. 186; H. Lammens, EI<sup>1</sup>, vol. III, p. 440. Most of the caravans to Syria had to use the official assigned marts in certain cities. The Byzantine Government obliged all foreign trade to pass through the official posts specially designated for the purpose and to be under proper supervision. Such regulations were to secure the taxes levied on all imports and to enforce the strict monopolies. The regulations were also to watch the entry and departure of foreigners. Some of whom were suspected spies, as the Byzantine Government itself maintained a sophisticated system of espionage in Persia, and other countries. See De Lacy O'Leary, op. cit., pp. 186-87.

appointed by the State.<sup>1</sup> These cities were the principal outlets and great markets for the Meccans' goods.

It is conceivable that considerable money had eventually been accumulated in the hands of the Meccan financiers or businessmen, who were of a saving disposition. The Arabs, during this time, were generally importers with respect to the Roman Empire. They carried back to Mecca only articles of high value. With regard to the trade balance, it was always substantially in the Roman Empire's favour. The Meccan caravans were of considerable size. Sometimes, the number of camels rose to 2,500. The number of merchants, guides and guards or scouts in each caravan varied from 100 to 300 or more. This gives some idea of the commercial or financial capacity of Mecca and the Meccans.<sup>2</sup>

Beside the giant financiers and opulent and rich bankers who were running the risks of speculation on a large scale in such financial operations of considerable complexity, there were the petty traders, brokers and shop-keepers who became the petite bourgeoisie of Mecca.<sup>3</sup> There were also some big and small industries of ironwork, carpentry and others.<sup>4</sup>

No ships or port were available near Mecca, apart from the desert shore in the little bay of Shu'ayba

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1. De Lacy O'Leary, op. cit., p. 187; Muf., VII, p. 292.

2. H. Lammens, EI<sup>1</sup>, vol. III, pp. 440-41.

3. H. Lammens, EI<sup>1</sup>, vol. III, p. 441.

4. For details on all other industries including private or public sectors, see Muf., VII, pp. 505 et seq.

and the desolate shore of Jidda, which were much nearer to the city of Mecca.<sup>1</sup> During this time, in Mecca, taxes on exportation, a departure tax, tithes, extra levies and charges, including maks (market dues) or 'ushr (custom duties) for crossing the borders of the market areas,<sup>2</sup> were imposed on foreign merchants, especially for those who did not acquire al-jiwār (the neighbourly protection or (the guarantee of a local clan or leading figure)). Such charges or taxes were for their entry, travelling about in the city, permits to stay, passage of their goods, trading and departure. These strict regulations were measures taken by the Meccans to recompense themselves from foreign traders, who treated them unjustly in their lands.<sup>3</sup>

The basic change finally occurred, when it was insisted in the Qur'ān:

"O ye who believe! Truly the pagans (the idolaters) are unclean; so let them not, after this year of theirs, approach the Sacred Mosque. And if ye fear poverty, soon will God enrich you, if He wills, out of His bounty, for God is All-Knowing, All-Wise."<sup>4</sup>

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1. H. Lammens, EI<sup>1</sup>, vol. III, p. 441.

2. Muf., VII, pp. 473-74 and 480. For maks (market dues), see also Intro., p. 76 (n.1); Ziaul Haq, op. cit., p. 222.

3. De Lacy O'Leary, op. cit., p. 182; H. Lammens, EI<sup>1</sup>, vol. III, pp. 437-38.

4. Q., 9:28.



This verse shows that non-Muslims were not allowed to enter the city of Mecca, after it was conquered by Muslims. Therefore, trading in Mecca became a Muslim monopoly.

There is some evidence to show that in Mecca, in pre-Islamic times, certain customary commercial law, which it presupposes, was enforced by the businessmen among themselves, as was the Law Merchant in Europe. This included some laws on agricultural contracts which may be postulated in both cities of Mecca and Medina and other places. There were also the legal procedures for loans with interest. However, the outlines of Islamic law of property, contracts and obligations did not form part of the customary law of the pre-Islamic Arabs.<sup>1</sup> It is very likely that both cities of Mecca and Medina had a law, possibly consisting of foreign elements, which was much more advanced in its development than the law of the Bedouin.<sup>2</sup> Further, in south Arabia there is some evidence which indicates that the commercial laws were even enforced by the ancient Kingdom of Qatabān.<sup>3</sup>

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1. Back., p. 29; Intro., pp. 6-7.

2. Back., pp. 28-29.

3. This kingdom was referred to by the historians as Kittibaina, Kattabaina, Kastabaneis, Catabanes or Catabani. But the inscriptions called it the Qatabān. This kingdom was situated at the extreme south-west corner of Arabia by the narrow strait which forms the entrance to the Arabian Sea (Bāb al-Mandab). For details of this kingdom, see De Lacy O'Leary, op. cit., pp. 96-98.



The laws were called the Qatabānic laws (al-Qawānīn al-Qatabāniyya), which were written in various ancient Arabic dialects of Qatabān. The laws consisted of rules for trade and business transactions in the market and determination of the rights of the government and its share of profits in the trade. This shows the scope or degree of meticulousness of the Qatabānīs in the affairs of commerce at the time.<sup>1</sup>

The pre-Islamic customary law in Arabia provides some of the technical terminology to the later technical terminology of Islamic law. However, such pre-Islamic legal terms must, historically and legally, be proved positively to show that they operate in Islamic legal vocabulary. In most cases, some archaic legal technical terms have often acquired in Islamic law a modified and strictly defined meaning or have a definitely different meaning, e.g. al-rahn (pledge), or they have lost their significant relation to former ancient symbolic acts, as in the case of al-ṣafqa (striking the hand in formalizing a contract of sale), or they have become uniquely representative of an archaic term, as in the case of al-ʿuhda (a guarantee against specific faults in a commodity), or they apply to institutions which Islamic law does not legalize or recognize fully, as in the case of

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1. Muf., VII, p. 232.

al-maks (market dues in pre-Islamic Arabia, which are considered as illegal taxes in Islamic law), al-‘umrā (donation for life) and al-ruqbā (donation with the stipulation that the object becomes the property of the surviving party), or they have been dropped from use as legal technical terms, as has al-malasā (the opposite of al-‘uhda). Further, there was no evidence to show that the customary law of pre-Islamic Arabia was influenced by some elements of foreign origin, though a number of Graeco-Latin terms and institutions, including military, administrative and legal, came to influence pre-Islamic Arabia through their contacts with the Byzantines from Syria. The origin of the Arabic verb dallas (to conceal a fault or defect in an article of merchandise from the purchaser) is said to have arisen from the Latin dolus. The word came into Arabic by way of commercial practice at an early time. But early Islamic law did not accept it as a new legal technical term for deceit or fraud.<sup>1</sup>

The use of written documents by the pre-Islamic Arabs is well attested. They were closely acquainted with them, especially in the environs of the surrounding countries of sedentary civilization. This practice appears to have come to Arabia both from Sāssānian ‘Irāq and Byzantine Syria. However, very few of the legal

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1. Intro., pp. 8-9.

institutions and terms from Southern Arabia, which had its distinct civilization, ever penetrated beyond its nucleus into Northern Arabian dominions. Nevertheless, it can be corroborated that the rule of two witnesses was derived from a pre-Islamic character of particular juridical institutions of the Southern Arabian civilization.<sup>1</sup>

The above meagre historical description indicates that the principal function of Islamic law is not to create a new commercial system of law but to re-evaluate or ratify the existing pre-Islamic institutions of contractual obligations and commercial laws completely or partially or change and modify those meanings and applications, totally or partly, which already existed during the time of the Prophet or which came about during or after the Muslim conquests, to ensure their validity and equity to both parties in each commercial contract, in accordance with Islamic legal principles, apart from the newly established and introduced legal institutions, whether by the Prophet and the succeeding generations.

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1. Intro., p. 9.



## II

### The Qur'ān and the commercial life of Muslims

Within the atmosphere of prosperity in Mecca, there were the familiar evils of a flourishing and prosperous commercial society, which showed extreme social, political, economic and commercial injustices. In relation to commerce and trade, the Qur'ān appeared not in the atmosphere of the desert and the nomad but, in reality, in that of financial and commercial sophistications and complexities. This is emphasized in the Qur'ān by the number of commercial terms which are used to represent the expression of theological doctrines and tenets.<sup>1</sup> Further, the Qur'ān, in its comprehensive use of commercial terms, becomes a relevant source of information on commercial law and practice in Mecca and Medina in the pre-prophetic and as well as the period after the Prophet.<sup>2</sup>

The following brief account gives a picture of development of injunctions of the Qur'ān in relation to business transactions.

#### The Meccan period

The prophetic life of the Prophet Muḥammad consists of twenty three years, i.e. thirteen years in Mecca and ten years in Medina. During his prophetic life in Mecca, after he had proclaimed himself Prophet at the

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1. Cf. C.C. Torrey, The Commercial-Theological Terms in the Koran (Leiden, 1892), pp. 1-51.

2. Intro., p. 6.



age of forty, he recited various Qur'ānic ayāt (verses) at any local meetings or prayers at which he was present. These verses were believed to have been revealed to him by God according to the time and situation. Some of the verses concerning bay' (sale)<sup>1</sup> or tijāra (trade or commerce)<sup>2</sup> were also revealed within this period in Mecca, but most of them formed the injunctions which leaned towards the application of doctrinal and ethical norms rather than legal commands, under which certain transactions were allowed or forbidden.

The Meccan sūras (chapters) of the Qur'ān testify to the fact that Islam was favourably inclined from the outset to promote commercial and trading activities. A verse in the sūrat al-Nabā', for example, which was one of the earliest Meccan sūras, encourages Muslims to use the day for profit-making occupations, as is God's will,<sup>3</sup> and most of the verses which are reported to have been revealed in Mecca such as in the surāt al-Jāthiya<sup>4</sup> and others<sup>5</sup> demonstrate that shipping (as a livelihood)

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1. For the definition of bay', infra Introduction, pp. 31-33.

2. For the term of al-tijāra, see W. Heffening, EI<sup>1</sup>, vol. IV, pp. 747-51.

3. Q., 78:11. Cf. Q., 10:67; 14:33; 16:12; 17:12; 25:47; 27:86; 28:73; 30:23; 36:37; 40:61; 73:7.

4. Q., 45:12.

5. See Q., 10:22; 14:32; 16:14; 17:66; 23:22; 26:119; 30:46; 31:31; 35:12; 36:41; 37:140; 40:80; 43:12.

is a bounty bestowed by God on mankind. Further, in one of the Meccan verses in the sūrat al-Mulk, it is stated that God made the earth manageable for men to traverse through its tracts and enjoy the sustenance which He furnishes, but to Him is the resurrection.<sup>1</sup>

The Qur'ān, during this period, also recounts that although the Arabs, especially the Quraysh led a nomadic life, they were, nevertheless, engaged in commerce. The winter and the summer caravans of the Quraysh set out at regular intervals for the South and the North. Such caravans were the most important business organization of the Meccans, and constituted a civilizing and uniting influence on them. The sūrat Quraysh<sup>2</sup> reads:

For the covenants (of security and safeguard or safe conduct enjoyed) by the Quraysh;<sup>3</sup> their covenants (covering) journeys by winter and summer;<sup>4</sup> let them adore the Lord of this House; Who provides them with food against hunger; and with security against fear (of danger).

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1. Q., 67:15.

2. Ibid., 106:1-4.

3. For their covenants of security or charters from the rulers of neighbouring countries and the tribal chiefs in those countries, supra Introduction, pp. 4-7.

4. Their caravans travelled to Yemen and the South in winter and to Syria and the North in summer. See T.J., XXIX, pp. 305-09; Muf., VII, p. 290. Through their extensive travels, the Quraysh became/

The use of false weights and measures and the exchange of different kinds of coins was another matter which incurred Qur'ānic condemnation. This shows that the Arabs, or the others, were guilty of fraudulent dealings in such transactions, in their daily trade. Such condemnation indicates that all Muslims are outrightly prohibited from getting involved in any unjust business transactions. The following early Meccan verses on this subject are found in the Qur'ān as a warning to Muslims and non-Muslims alike. In the sūra entitled "Those who deal in fraud (al-muṭaffifīn)", the Qur'ān uses strong words against such offenders and against short measures and weights:

"Woe to those that deal in fraud,  
those who when they have to receive  
by measure from men, exact full  
measure,  
but when they have to give by measure  
or weight to men, give less than due.  
Do they not think that they will be  
called to account?  
On a Mighty Day,  
a Day when (all) mankind will stand  
before the Lord of the Worlds?"<sup>1</sup>

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/became experienced travellers and merchants and they acquired considerable knowledge of the world and of the arts. Their language also became a sophisticated medium of literary expression. Cf. Hitti, op. cit., pp. 30 et seq.

1. Q., 83:1-6; see also 6:152; 7:85; 11:84 and 85; 17:35; 26:181 and 182.



In relation to ribā (usury), the Qur'ān already prohibited it as early as in the Meccan period. In the Qur'ān, such practice was forbidden by the verse:

"That which ye lay out for increase  
(in usury) through the property of  
(other) people, will have no increase  
with God."<sup>1</sup>

### The Medinan period

During the Medinan period, the Qur'ānic injunctions on commercial transactions were extended and became more sophisticated, especially after Muslims had become an "umma" or "community" who had their own constitution and government with the Prophet himself as leader.<sup>2</sup> In this period of growth, a large number of characteristic features of Islamic law came into existence and the nascent Islamic society constituted its own legal institutions, including business and commercial institutions.<sup>3</sup> In addition, Muslims, during this phase, began to come into contact with the Jewish community in Medina<sup>4</sup> and foreigners from outside the city.<sup>5</sup> There-

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1. Q., 30:39.

2. For further discussions on the Muslim umma and the Constitution of Medina, see IH., II, pp. 106-08; Muhammad Hamidullah, The First Written Constitution in the World (Lahore, 1975); Medina, pp. 221-60.

3. Back., p. 33.

4. Medina, pp. 192-220.

5. IH., IV, pp. 187-88.



fore, the Qur'ān started enjoining believers to observe several regulations and commandments relating to any new situation which might arise. These injunctions included such exhortations as, "Spread over the globe and seek of the bounty of God."<sup>1</sup>

The Medinan sūras, however, stipulated various restrictions. For instance, a difference is established between decent trading, especially by mutual good will between the contracting parties, which is lawful,<sup>2</sup> and usury (ribā) which is unlawful. It is stated in the Qur'ān that:

"Those who devour usury will not stand except as stands one whom the evil one by his touch hath driven to madness. That is because they say: 'Trade is like usury,' but God hath permitted trade and forbidden usury. Those who after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for God (to judge); but those who repeat (the offence) are companions of the fire: they will abide therein (forever). God will deprive usury of all blessing, but will give increase

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1. Q., 62:10.

2. Ibid., 4:29.

for deeds of charity: for He loveth  
not creatures ungrateful and wicked."<sup>1</sup>

In other verses:

"O ye who believe! Fear God, and give  
up what remains of your demand for  
usury, if ye are indeed believers.  
If ye do it not, take notice of war  
from God and His Apostle: But if ye  
turn back, ye shall have your capital  
sums: deal not unjustly, and ye shall  
not be dealt with unjustly."<sup>2</sup>

According to these passages quoted from the Qur'ān,  
there shall be a double punishment for the practice of  
usury, namely, the loss of God's blessing in this world,  
and the torture of hell in the next. Notwithstanding  
the prohibition of usury, the category of search for  
lawful earnings is even declared to be a bounden duty.<sup>3</sup>  
Beside usury, the Qur'ān also prohibits gambling,<sup>4</sup>  
bribery,<sup>5</sup> consuming other's property unlawfully.<sup>6</sup>  
Apart from that, there is only one restriction that  
follows from this general injunction, and that is the  
cessation of trading during the congregational prayer  
on Friday, before and after which trading is permitted,<sup>7</sup>

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1. Q., 2:275; cf. Q., 3:130.
  2. Ibid., 2:278-79.
  3. Ibid., 2:168.
  4. Ibid., 5:93; cf. 2:219.
  5. Ibid., 2:188.
  6. Ibid., 4:29.
  7. Ibid., 62:9-11.

just as it is explicitly permitted during the pilgrimage to Mecca,<sup>1</sup> in conformity with the well-established pre-Islamic custom of setting up fairs and trading during this sacred session in al-Ḥijāz.<sup>2</sup>

The regulations concerning contracts of debts for fixed terms also demonstrate the complete freedom of trade permitted by the Qur'ān, with its minimal restrictions on the fulfilment of religious obligations and in conformity with the ethical requirement of fair dealing. For the purpose of greater systemization and reliability, the Qur'ān imposed the regulations of writing and taking witnesses<sup>3</sup> whenever a contract of loan and a commercial contract are made.<sup>4</sup> But in such a contract where the payment and delivery of the goods are made immediately or without delay, then the writing of it is optional.<sup>5</sup> If a contract of loan or a commercial contract is made on a journey and

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1. Q., 2:198.

2. Cf. Azr., I, pp. 179-97; T.J., II, pp. 282-85; Jam., II, pp. 389-90.

3. The testimony by the witnesses is recommendably required to prevent any injustice between the parties, see Um., III, pp. 88-89. The Companions and the Successors agreed that such writing and testimony by witnesses are recommendable not obligatory, see Abū Bakr Aḥmad b. 'Alī al-Jaṣṣāṣ, Aḥkam al-Qur'ān, I (Cairo, 1347 A.H.), pp. 571-79.

4. Q., 2:282.

5. Ibid. Cf., T.J., III, p. 132; Jam., III, p. 402.



a scribe is not available, the Qur'ān permits the making of a contract on a pledge or security. In addition, any deposit should be returned or discharged faithfully to its owner. Any evidence including any contractual obligation must be given truly.<sup>1</sup> All obligations are bound to be fulfilled.<sup>2</sup> The Qur'ān, in the Medinan period still emphasized the illegality of using false weights<sup>3</sup> and measures.<sup>4</sup>

These Qur'ānic injunctions reflect the picture of general laws in which no detailed regulations are revealed for trade and commerce. The regulations were interpreted piecemeal and promulgated with further minute descriptions by the Prophet in his Traditions.

The same spirit of economic liberalism pervades the prophetic Traditions as well. This is evident when the Traditions indicate the Prophet's liberal attitude to trade which is clear from the fact that he himself had taken an active part in commerce and trade.

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1. Q., 2:283.

2. Ibid., 5:1.

3. Ibid., 6:152; 55:8 and 9.

4. Ibid., 6:152.



### III

#### a. Theoretical issues on the concept of bay' or sale

When the discussion on the law of business transactions or contractual obligations in Islam is made, it is bound to investigate the term bay' since the majority of jurists subsume most other commercial transactions under the rubric of bay'. Literally, bay' means transaction, both sale and purchase, but in the legal-technical terminology of al-fuqahā' (singular al-faqīh) or the jurists it means mubādala, the simple exchange or barter of commodities; it is an exchange mutually agreed upon between the two or more parties concerned.<sup>1</sup> In fact, two roots are used in Arabic to imply the contract of sale: b.y.' and sh.r.y.<sup>2</sup> In both senses of the word according to original legal procedure an element of contract or agreement, i.e. ṣafqa, mubāya'a or mu'āhada, is assumed when the purchaser strikes his hand on that of the seller to signify acceptance (qabūl) of the offer (ījāb),<sup>3</sup> which is made usually in the same session. Sale is a bilateral

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1. Zur., III, p. 250; Lis., VIII, p. 23; Tahanawi, I, p. 137; Schacht, EI<sup>2</sup>, vol. I, p. 1112.
  2. Lis., VIII, p. 23; Lan., I, p. 284; Lan., II, pp. 1544-45; J. Schacht, EI<sup>1</sup>, vol. I, p. 1111.
  3. Zur., III, p. 250; Lis., X, p. 200; Taj., VI p. 409; Intro., pp. 8, 145 and 146.

transaction.<sup>1</sup> The most ordinary foundation for an obligation occurring is the contract ('aqd). This is the field of pecuniary transactions (mu'āmalāt). The conclusion of the contract is basically informal; only the literal meanings of definite technical terms, such as ṣafqa, striking hand upon hand, for concluding a sale or contract, reflect former symbolic acts.<sup>2</sup> In the more elaborate variant, the vendor should make an offer of the goods, e.g. by pronouncing the words, "I sell you" or "I make you owner of" such and such a thing, the purchaser ought to pronounce his consent, e.g. by saying, "I buy the object," "I accept the ownership of," or "I accept" the object.<sup>3</sup> This action indicates the mutual consent which is required by Islamic law for the validity of a contract of sale or exchange of commodities or properties.<sup>4</sup> A sale consists of four basic elements, namely al-bā'i' (the seller or vendor), al-muḥtā' (the purchaser), al-thaman (the price) and al-muḥamman (the prized or valued commodity).<sup>5</sup> The legality of sale is sanctioned in the Qur'ān.<sup>6</sup> Such a contract of sale which illustrates the essence of the Islamic law of contractual obligations

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1. Intro., p. 145.

2. Ibid.

3. Cf. Jam., III, p. 357.

4. Kas., V, p. 133; Jam., III, p. 357; Naw., p. 124.

5. Jam., III, p. 357.

6. Q., 2:275.

or commerce and trade includes this particular contract as well as other commutative or synallagmatic contracts.<sup>1</sup> Al-Zurqānī quotes Ibn al-‘Arabī who says that in the wider sense of economic contracts, transactions and social contracts like the institution of marriage, bay‘ constitutes the basis of society, since human beings by nature rely on food resources and sex. As all resources are created by God for the benefit of man, it is essential that a man should be aware of his basic needs as of the requirements of legal contracts, to which end the study of buyū‘ (plural of bay‘) is the duty of every Muslim.<sup>2</sup>

b. The scope of this study

This study stretches over the law of contractual obligations or commerce and trade in early Islam. Therefore, other themes do not come within this purview of investigation, because of their irrelevance or semi-irrelevance to the actual legal outlook of this law. Those subjects are al-hiba (donation or gift), al-waṣīyya (legacy), al-waqf (pious foundation or mortmain; endowment), the pre-Islamic customary law of al-‘umrā (donation of a life interest) and al-ruqbā (donation with the stipulation that the object becomes the property of the surviving party or reciprocal posthumous gift). Since these

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1. Intro., pp. 151-52.

2. Zur., III, p. 250.



contracts incline to the purport of gifts and donations, accordingly, they are left out of the scope of this study. Moreover, even though al-wakāla (agency or procuration) has a great extent or range of integral relationship with the law of contractual obligations, nevertheless it needs a separate study because of its wide and independent subject matter and because of the fact that it is open to full research independently, therefore it is not included in this study. The study of al-ribā (usury) is also not included, except that it is mentioned piecemeal in various topics which are related to it. It is considered to be unnecessary to work it out in detail in the present study, since the subject of al-ribā has been extensively covered by many researchers in the East and the West in recent years. The subject of al-ghaṣb (usurpation), iḥyā' al-mawāt (cultivation of a waste land in order to acquire its ownership), al-iqtā' (grant of benefice, or a piece of land), al-'itq (manumission), al-luqaṭa (found property) and al-ṣadaqa (charitable gift) are not studied in the present work either, because they are not pertinent to the law of contractual obligations or sales and contracts in general.

The categories of bay' (sale) have been thoroughly studied and carefully developed by al-fuqahā' (the jurists). However, this thesis is confined to the investigation of the development of business transactions in the introductory stage of Islamic law. Therefore, the chronological phases of its growth during the prophetic period and subsequently



in the early periods of Islam, i.e. the periods of the Companions of the Prophet (al-ṣaḥāba), their successors (al-tābi'ūn) are examined and, in addition, some legal opinions of the earlier jurists are also inquired into.

This thesis will closely examine the literature of the Qur'ān and its exegesis, al-sīra (the biography of the Prophet), his Traditions, the early historical accounts of the pre-Islamic Arabs, the first and the second generations of Muslims, including their military expeditions, biographies and annals, apart from the early and late legal treatises and manuals. By doing this, one may gain the impression of commerce and trade of intense activity springing out of Mecca, Medina and the surrounding Arabian market places during the lifetime of the Prophet, the Companions and the Successors. It is intended that such investigation may reflect not only the commercial lives of the people in the region in pre-Islamic times of Arabia but also may project forward the commercial activities in the succeeding generations of the Muslim umma (community) from the outset of its foundation. The inception of such Islamic commercial milieu arose from the life of the Prophet himself who retained the impress of his Quraysh education and training. After his prophethood this fundamentally mercantile character is displayed at every turn. He expanded it in accordance with Islamic precepts and tenets, which were revealed to him.

## CHAPTER I

### GOOD MANNERS, DECENCY AND ETHICS IN TRADE

This chapter is concerned with a discussion of the twelve codes of ethical discipline in Islamic commercial transactions. Without any of them, a contract of business is regarded as lacking perfection in accordance with Islamic good manners, decency and ethical standards. In the main these practices can be regarded as moral injunctions and are in keeping with the general tenor of Islamic morality. They can be divided into practices which Muslims are encouraged to follow and those which they are discouraged from following, as follows:

#### I. Encouragement of -

1. wariness of doubtful property and work;
2. doing business in the early morning;
3. trustworthiness or truthfulness in business transactions;
4. generosity in bargaining and modesty in claiming debts;
5. giving time to any debtor to pay his debt;
6. voluntary rescission of an unwanted sale (al-īqāla); and
7. generosity in business.

II. Discouragement or Prohibition of -

1. business transactions in the mosque;
2. raising voices in the market;
3. false swearing;
4. lies and hiding facts in sale; and
5. fraudulence (al-khilāba).

The ethico-legal attitudes and standards in trades which form the basis of the rulings of the Companions and the Successors are found in Traditions from the Prophet which are in the spirit of his general religious teaching.

I. Encouragement of -

1. Wariness of doubtful property and work

Legal and illegal things are clearly defined and in between them are some doubtful things which should be avoided. The Prophet is reported to have said:

"Both legal and illegal things are obvious, and in between them are doubtful matters which are not known by many people. So whoever is wary of those doubtful things, he purifies himself for his religion and his honour."<sup>1</sup>

2. Doing business in the early morning

It is encouraged to start business or open shops

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1. Han. M., p. 157 (325); Da., II, p. 245.

early in the morning. The Prophet is reported to have sent his servants for trade in the early morning and got a lot of profit.<sup>1</sup> He used to pray for his community saying:

"O God! Give your blessing to my umma (community) for their effort, or endeavour (including in trading or business), early in the morning."<sup>2</sup>

3. Trustworthiness or truthfulness in business transactions

Trustworthiness or truthfulness is encouraged in business transactions and the Prophet is reported to have said:

"The truthful merchant (is rewarded by being ranked) on the Day of Resurrection together with the Prophet, the truthful ones, the martyrs and the pious people."<sup>3</sup>

Dishonest traders, on the other hand, are blameworthy. The Prophet is reported to have said:

"Oh traders (three times)! Surely you will be resurrected on the Day of Judgement as transgressors, except him who is dutiful and sincere."<sup>4</sup>

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1. Tay., VI, p. 175.

2. Khar., p. 119; Tay., VI, p. 175; Tir., III, p. 508.

3. J. Ma., II, pp. 2-3.

4. Ibid., p. 3.



4. Generosity in bargaining and modesty in claiming debts

One should be easy and generous in bargaining, and whoever demands his debts should do so in a modest manner. The Prophet is reported to have said:

"May God's mercy be on him who is lenient in his buying, selling, and in demanding back his money (or debts)."<sup>1</sup>

The Prophet is also reported to have said:

"God will let the man enter the paradise who is an easy purchaser (in bargaining), an easy vendor (in selling), an easy debtor (in repaying the debts) and an easy creditor (in lending and demanding back the loans)."<sup>2</sup>

5. Giving time to any debtor to pay his debt

- i. Sufficient time should be given to a rich person to pay his debts at his convenience. The Prophet is reported to have said:

"A servant of God was called before God on the Day of Judgement and he said:  
'I do not know anything except a good deed, which I have done, and I do not expect anything by doing it except to meet you. I have granted time to the rich person (to pay his debt at his convenience) and forgive (or forget the

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1. Haz. M., VIII, p. 351.

2. Ah. M., I, p. 335 (410).

debt of) the needy! Upon this God said:  
'I have more right to this, so overlook  
(the faults of) my servant.'"<sup>1</sup>

ii. One should wait for a poor person to pay back his debt until he is able to repay it. In the two Traditions, the Prophet is reported to have said:

a. "God will put a servant of Him, under His shade on the day when there is no shade except His shade, the one who grants time to the one who is in straitened condition (mu'sir) or leaves (forgives) the debtor (without paying his debt)."<sup>2</sup>

b. "Whoever causes hardship to (one of) my community in demanding back his debt when he is in straitened circumstances, God will cause him discomfort in his grave."<sup>3</sup>

No comments appear to have been made by the Companions and the Successors on the above five subjects. It seems that those codes of conduct were obvious and all traders are obliged to follow them.

6. Voluntary rescission of an unwanted sale (al-iqāla)

This practice is much nearer to commercial law than the other. However, it still falls within the standards which Muslims were encouraged to follow. It had been

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1. Han. M., p. 163 (344); Mus., III, p. 823.

2. Ah. M., II, p. 5 (532).

3. Han. M., p. 163 (345); J. Ma., II, p. 71.

universally recognized during pre-Islamic times,<sup>1</sup> and was encouraged later by the Prophet,<sup>2</sup> to continue as a recommendable act, to relieve any uneasiness. It is encouraged to rescind any transaction voluntarily,<sup>3</sup> when the purchaser sees that he has no need for the commodity which he has bought and he thinks that the vendor needs it.<sup>4</sup> According to al-Shāfi'ī, al-īqāla is cancellation of a sale (faskh bay') and that is allowed if it has been concluded before the possession.<sup>5</sup> The Prophet is reported to have said:

"Whoever rescinds a regretful (seller),<sup>6</sup>  
God will rescind his obstruction (on the  
Day of Judgement)."<sup>7</sup>

The Prophet allowed al-īqāla and a new transaction of the rescinded goods may be made after the rescission.<sup>8</sup>

After the rescission of the contract, the parties have to return what they have taken from one another, i.e. the price and the goods.<sup>9</sup> Al-īqāla is not a sale. Therefore, it is a form of voluntary cancellation of a

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1. Lis., XI, p. 579; Muf., VII, pp. 400-01.

2. Haz. M., IX, p. 3.

3. Haz. M., IX, p. 3.

4. Sab., III, p. 121.

5. Um., III, p. 93.

6. It was also reported the Prophet also said: "Whoever rescinds a Muslim...", in Dau, III, p. 372.

7. Haz. M., IX, p. 3.

8. Mud., IV, p. 81; San. VIII, p. 49.

9. Um., III, p. 93; Sab., III, p. 121.



sale,<sup>1</sup> as an encouraged deed which is not included in the category of al-khiyār (option).<sup>2</sup>

### The Companions

Of the Companions, 'Abd Allāh b. 'Umar saw no harm in rescission of a sale,<sup>3</sup> if both parties to a contract agreed to such action and it was beneficial to both of them.

### The Successors

Some of the Successors agreed that there was no harm to either party in the rescission of a contract, if they both agreed to such an action, and if they thought it would be beneficial and advantageous to their own interests. This view was held by Shurayh, Muḥammad b. Sīrīn, Sa'īd b. Jubayr and Ṭawūs. But 'Aṭā' b. Abī Rabāḥ, Ma'mar b. Rāshid and al-Aswad b. Yazīd al-Nakha'ī did not allow rescission.<sup>4</sup> It appears that their view was that such rescission should be discouraged to prevent any confusion and fraudulence. This also shows that both vendor and purchaser have the right to reject any application or request for rescission from either side.

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1. Um., III, p. 93.

2. Ibn Ḥazm regarded al-iqāla as a sale. See Haz. M., IX pp. 5-6; cf. Intro., p. 148.

3. San., VIII, p. 19.

4. Ibid., pp. 18-19.

7. Generosity in business

Generosity is strongly recommended to purify wrongfulnesses, malpractices and unsuitable acts while doing business. The Prophet is reported to have said:

"Oh the assembly of merchants! Surely swearing (in bargaining or haggling) for prices is present in sale (or trade), then blend (or mix always your) sale (or trade) with charitable gift(s)."<sup>1</sup>

No comment seems to have been made by the Companions and the Successors on this subject.

II. Discouragement or Prohibition of -

1. Business transactions in the mosque

Doing business transactions in the mosque is disapproved of. The Prophet is reported to have said:

"Whenever you see a man who is selling (or purchasing goods) in the mosque you should say: God will never give profits in your business."<sup>2</sup>

2. Raising voices in the market

In pre-Islamic times, the traders had made a lot of noise in the markets in order to attract customers or prospective buyers. Such noise had assisted fraudulence which could be hidden behind it.<sup>3</sup> Such a habit was

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1. J. Ma., II, p. 5.

2. I. Shu., I, p. 31; cf. Ah.M., XI, p. 196(6991);  
Haz. M., IX, p. 64.

3. Muf., VII, p. 398.

discouraged by Islam, since it caused a lot of inconvenience, uneasiness and chaos to the disciplines of the markets.<sup>1</sup>

It appears that there is no comment made by the Companions and the Successors on the above two subjects.

### 3. False swearing

False swearing while selling is disapproved of. False swearing will cause the loss of the blessing. The Prophet is reported to have said:

"False swearing (by the seller) is beneficial to the trade, i.e. it may persuade the buyer to purchase the goods, but in that way he will be deprived of God's blessing to the earnings."<sup>2</sup>

### The Companions

False swearing is sinful, even though the transaction is valid. According to Mu'ādh b. Jabal, if false swearing is made in a contract in any business transaction, the sale will be valid, but it will be tantamount to a sinful act.<sup>3</sup>

### The Successors

Only Muḥammad b. Sīrīn commented on this subject.

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1. Umd., X, p. 242.

2. Ah. M., XII, p. 195(7206) and XIII, p. 19 (2791).

3. San., VIII, p. 313.



According to him, if a man was bidding for some goods and swore not to buy the goods at such a price, yet bought them at that price, then the transaction was valid, but he was sinful on account of his swearing.<sup>1</sup> This indicates that swearings in trade are sinful and that Islamic law disapproved of such deeds.

4. Lies and hiding facts in sale

The seller and the buyer should explain the good and bad points of the transaction. Lies and hiding facts in a deal will cause the loss of the blessing. The Prophet is reported to have said:

"... and if both parties (the buyer and the seller) spoke the truth and described the defects and qualities (of the goods), then they would be blessed in their transactions, and if they told lies and hid something, then the blessing of their transaction would be lost."<sup>2</sup>

It appears that no comments have been made by the Companions and the Successors on this particular ethical code of Islamic transactions.

5. Fraudulence in trade (al-khilāba)

Certain kinds of fraudulence or deception (al-khilāba) had commonly been practised in the pre-Islamic period, such as bay' al-muṣarrāt wa al-muḥaffalāt (sale by

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1. San., VIII, p. 313.

2. Um., III, p. 4.

keeping animals unmilked for a long time), and so on.<sup>1</sup> Such transactions were prohibited by Islam.<sup>2</sup> To emphasize the prohibition of such transactions, it was reported that a person came to the Prophet and told him that he had always been betrayed in purchasing. The Prophet told him to say, at the time of buying, "No cheating, and then you have the right of option for three (days) from your sale."<sup>3</sup> Therefore, whenever he bought goods, he said, "No cheating."<sup>4</sup>

### The Companions

On this point, 'Abd Allāh b. Mas'ūd stressed that all Muslims were forbidden from deceiving in business (al-khilāba).<sup>5</sup> This indicated that the Companions emphasized good conduct and ethical standards in business. All business transactions must be without any dishonest practices.

### The Successors

Muḥammad b. Sīrīn made his comment on this subject. He prohibited any fraudulence in business transactions. He even considered it to be deception (al-khilāba) if

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1. Muf., VII, pp. 397-99.

2. Infra chapter II, pp. 108-12.

3. Haz. M., VIII, p. 409.

4. Muw. Sh., p. 279; Muw. Y., p. 570.

5. San., VIII, p. 198.

a seller did not explain about the conditions of two different goods to his customers.<sup>1</sup>

### Conclusion

This chapter shows the basic principles of Islamic ethics in business transactions which were laid down by the Prophet and continued to be practised by the Companions and the Successors. Such principles become a part of the integral codes of conduct and ethos of Islamic business transactions.

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1. San., VIII, pp. 312-13.



## CHAPTER II

### CONDUCT OF THE MARKET

In this chapter, the analysis will be divided into two parts:

#### I. The Management and Modes of the Market and its Classifications:

1. The basic attributes or basic elements of merchandise, res in commercio, and the vendor.
2. Al-tas'ir (Price-fixing).
3. Al-ihtikār (Hoarding).
4. The protection of purchasers' rights.

This includes -

- i. Al-musāwama (Outbidding after a contract has been agreed);
  - ii. Al-najsh (Trickery);
  - iii. Ikhfā' al-'ayb (Concealing of defect) and al-ghish (cheating);
  - iv. Exacting full measure and weight;
  - v. Al-kharāj bi al-ḍamān (The profit belongs to him who bears responsibility); and
  - vi. Waḍ' al-jawā'ih (Remission in the payment of yield stricken by calamity or disaster).
5. The protection of traders' rights.

This consists of -

- i. A sale concluded between a townsman and an

inhabitant of the desert or of the country and to meet the riders (or traders) on the road for the purpose of getting undue advantage (talaqqī al-jalab or talaqqī al-rukbān);

- ii. Any excess of transacted goods belongs to the traders;
- iii. Bay' al-mujīzān (A bargain involving two bidders);
- iv. Bay' al-mukrah (A sale by force or under duress, force majeure); and
- v. Al-khalās fī al-bay' (Liquidation of a sale).

6. The protection of both parties in a contract:  
This constitutes the only contract of -  
Bay' al-muzāyada (Sale by auction).

## II. Voidable Contracts:

Al-khiyār (The right of option, optio)

The origin of al-khiyār and its practice in pre-Islamic times.

The divisions of al-khiyār:

- 1. Khiyār al-faskh (Unconditional option to revoke):
  - a. Khiyār al-majlis (The option of the session); and
  - b. Khiyār al-shart (Option by stipulation).
- 2. Khiyār al-'ayb (Option to revoke for fault):
  - a. Khiyār al-ru'ya (Option at sight); and

- b. Khiyār al-‘ayb (Option for defect)  
Bay‘ al-barā‘a (The sale by waiving all  
claims without any liability)
- 3. Khiyār al-ghalaṭ (Option for mistake)
- 4. Khiyār al-tadlīs or al-taghrīr (Option for  
fraud).

Bargaining after a contract has been agreed.



I. The Management and Modes of the Market and its Classifications

This part forms the first aspect of conduct of the market. The discussion of this part is further subdivided into six sections as follows:

1. The basic attributes or basic elements of merchandise, res in commercio, and the vendor

It is possible to analyse these attributes into systematic divisions which are required for sale of any property or merchandise. The Traditions of the Prophet provide material for the following classification of these attributes. However, it is from the later Islamic scholars that we learn their more detailed categorization. Such classification makes them easy to understand. Those essential attributes are:

i. Pure substances which are considered to be ritually and legally clean, wholesome and are, of course, marketable and they are the objects of legal value in cultic regulations. In the Traditions from the Prophet it is reported that he ruled that all properties which are regarded as unclean religiously cannot therefore be sold, as for example dogs,<sup>1</sup> except hunting dogs,<sup>2</sup> intoxicants,<sup>3</sup>

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1. Muw. Y., p. 548. The ritual uncleanness of dogs was the same as in Judaism. Cf. Orig., p. 216.

2. Han. M., p. 162 (341); J.Ma., II, p. 10.

3. Waq., II, p. 864; J. Ma., II, p. 19; Muw. Y., p. 733.



pigs, carcasses<sup>1</sup> not ritually slaughtered,<sup>1</sup> idols<sup>2</sup> and so on.<sup>3</sup> They cannot be benefited from and are prohibited by the Islamic credo.

### The Companions

The Companions, like 'Umar b. al-Khaṭṭāb,<sup>4</sup> Abū Hurayra,<sup>5</sup> 'Ā'isha,<sup>6</sup> 'Abd Allāh b. 'Abbās<sup>7</sup> and 'Abd Allāh b. 'Umar<sup>8</sup> agreed that merchandise must be considered to be a ritually pure substance. Therefore, any substance which is religiously and legally unclean cannot be an object of sale, as for instance intoxicants, carcasses which are not slaughtered in accordance with the law, blood and so on. However, 'Umar b. al-Khaṭṭāb allowed the sale of intoxicants and pigs among ahl al-dhimma or al-dhimmiyyūn (<sup>free</sup>non-Muslim subjects living in an Islamic state who, in return for paying the capitation tax (al-jizya), enjoyed protection and safety and are exempted from military service), because those merchandises were considered as their property.<sup>9</sup>

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1. Waq., II, p. 864; Ah.M., XI, p. 202 (6997).
  2. Waq., II, p. 864; Haz. M., IX, p. 8.
  3. See Waq., II, p. 864; Muw.Y., p. 548.
  4. Muw. Y., p. 734; San., VIII, pp. 195-96; Ah. M., V, p. 118 (3345).
  5. Haz. M., IX, p. 10.
  6. San., VIII, p. 195.
  7. Khar., p. 123.
  8. Han. M., p. 157 (320).
  9. Asl, pt. I, vol. 1, pp. 221-22 (20).

### The Successors

Muhammad b. Sīrīn<sup>1</sup> and Masrūq b. al-Ajda',<sup>2</sup> among the Successors, were of the opinion that merchandise must be regarded as ritually pure substances. Therefore, any religiously and legally unclean object could not be sold.

ii. Materials which are only of some use and consequently of some intrinsic value and can be sold. All such commodities are legally saleable, including hunting dogs. The Prophet permitted such sale.<sup>3</sup>

The Companions and the Successors did not make any comment on this subject.

iii. The merchandise must be possessed and the vendor must be the real owner, with ownership in the sense of full and absolute right, dominium or the statu liber. It had been common practice by the pre-Islamic Arabs to sell goods which had not been with the vendor and had not been possessed by him.<sup>4</sup> The Prophet instructed people that resale of foodstuffs should be allowed only if the seller had already possessed them<sup>5</sup> and after taking delivery and receiving them.<sup>6</sup> This actual procedure

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1. Huj., II, p. 760 (n.3); Haz. M., IX, p. 10.

2. San., VIII, p. 195.

3. Han. M., p. 162 (341); J. Ma., II, p. 10.

4. Muf., VII, pp. 393 and 399.

5. Um., III, pp. 36-38.

6. J. Ma., II, pp. 11-12; Muw. Y., p. 538; Um., III, pp. 36-38.



was later known as istifā' or taqābuḍ (receiving or taking possession reciprocally).<sup>1</sup> The Prophet is reported to have said:

"He who buys foodstuff should not sell it until he has taken possession of it,"<sup>2</sup> and "until he (has paid for and) accepted it."<sup>3</sup>

### The Companions

It was reported that Ḥakīm b. Ḥizām had bought some commodities in the time of 'Umar b. al-Khaṭṭāb, the Caliph, from al-Jār,<sup>4</sup> and intended to sell them to others. 'Umar b. al-Khaṭṭāb ordered him not to sell these commodities before possessing them.<sup>5</sup> Zayd b. Thābit,<sup>6</sup> 'Abd Allāh b. 'Umar<sup>7</sup> and 'Abd Allāh b. 'Abbās<sup>8</sup> held the same view as 'Umar. Their interpretation also implies

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1. Cf. Zur., III, pp. 296-97; Intro., p. 138.
  2. Muw. Sh., p. 270; Muw. Y., p. 534; Um., III, p. 36.
  3. Han. M., p. 159 (332); Muw. Y., p. 534. Coulson added two more basic elements of sale. First, immediate transfer of ownership, therefore, no contract for consideration can validly be made under Islamic law, in futuro. Second, fixed price. A sale is null if it is made with no determined price and no specified time for payment. See C. Com., p. 20.
  4. Al-Jār was a coastal town near Medina. See San., VIII, p. 29 (n.1); Niha., I, p. 314; Yaq., II, p. 5.
  5. Muw. Sh., p. 269; Muw. Y., p. 535; San., VIII, p. 29.
  6. San., VIII, p. 28.
  7. J. Ma., II, p. 18; Muw. Sh., p. 270; Muw. Y., p. 535; San., VIII, p. 28.
  8. J. Ma., II, p. 18; Muw. Sh., p. 270; Huj., II, pp. 648-49 and 657-58.



that the vendor must be the real owner of the goods. Otherwise, he is not entitled to involve himself in any contract. In addition, by way of extension, 'Abd Allāh b. 'Abbās interpreted and opined that the above two Traditions of the Prophet referred to all kinds of commodities and considered them to be in the same position as foodstuffs.<sup>1</sup>

### The Successors

Qatāda b. Di'āma, Muḥammad b. Sīrīn<sup>2</sup> and Sa'īd b. al-Musayyib,<sup>3</sup> like the Companions, continued to disallow the making of any contract before the goods were possessed. But, according to Qatāda b. Di'āma, there was no harm in any goods which were not owned being transacted, if the vendor was empowered to do so. Further, Muḥammad b. Sīrīn did not allow any sale in which the goods were to be delivered within a year or so, without any specific time being fixed,<sup>4</sup> i.e. a contract in futuro. In other words, such a sale is made before the goods have been possessed by the vendor. The Successors widened their rulings on this subject. According to Ṭāwūs and Qatāda, if the goods were damaged before being paid for, they belonged to the vendor.<sup>5</sup> But if they

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1. Muw. Sh., p. 270; Um., III, pp. 36 and 70; San., VIII, p. 38.
  2. San., VIII, pp. 28-29.
  3. Muw. Sh., p. 29; Muw. Y., p. 536.
  4. San., VIII, pp. 28-29.
  5. Ibid., pp. 46-47.

were damaged after the purchaser had promised to take them, they belonged to the latter and the former had to replace them. This was held by Ṭāwūs, Qatāda, Ibrāhīm al-Nakha'ī, Muḥammad b. Sīrīn<sup>1</sup> and al-Ḥasan al-Baṣrī.<sup>2</sup> Further, according to Muḥammad b. Sīrīn, if any party in the contract made a precondition for replacement of damaged goods, the liability for such replacement was on the one who made it.<sup>3</sup>

## 2. Al-tas'īr (Price-fixing)

### Price-fixing in pre-Islamic times

In pre-Islamic times, rich traders had fixed prices for goods as they wished, in order to acquire big profits from their business. They continued such practice without taking account of any consequences and without offering any mercy to other poor traders and needy customers. Such acts had caused a lot of hardship to other people.<sup>4</sup>

### Al-tas'īr and the Prophet

Al-tas'īr means the fixing prices,<sup>5</sup> for any goods for the purpose of doing justice to the seller and not causing difficulty to the customers or purchasers. But the public authority in most cases is not allowed to fix the price. The Prophet is reported to have said:

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1. San., VIII, p. 47.

2. Cf. Huj., II, p. 639; San., VIII, p. 47.

3. San., VIII, p. 48.

4. Muf., VII, pp. 395-96 and 398-99.

5. Lis., IV, p. 365; Lan., I, p. 1363.

"The cheapness and the high level of price is from God and surely I love to meet God and no injustice on anyone with me."<sup>1</sup>

In another Tradition, a man asked the Prophet:

"(Could you) fix the price of the food-stuff for us?"

The Prophet is reported to have replied:

"Surely the high level of price and its cheapness are in the hand of God, and I surely hope to meet Him and no one (among you) should request of me any iniquity (or act of injustice) in blood (in case of homicide or retaliation) or property (in cases of business transactions)."<sup>2</sup>

#### The Companions

‘Umar b. al-Khaṭṭāb said:

"Whoever comes to our land with merchandise, he can sell it as he wishes, he is our guest till he goes out, he is our example (or model)."<sup>3</sup>

He also said:

"Whoever sells (his goods) in our market, we are his guarantor."<sup>4</sup>

In a report, ‘Umar b. al-Khaṭṭāb had passed by

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1. Ath., p. 184 (834).

2. San., VIII, pp. 205-06.

3. Ibid., p. 206.

4. Ibid.



Hāṭib b. Abī Balta'a who had been underselling some of his raisins in the market. 'Umar b. al-Khaṭṭāb had said to him:

"Either increase the price or leave our market."<sup>1</sup>

According to al-Zurqānī, 'Umar had ordered Hāṭib to increase the price of his raisins to what the other merchants were asking in the same market or that he should leave the market to avoid causing hardship, or disadvantage and loss to other merchants.<sup>2</sup> Any interference or intervention on behalf of the public authorities will subject manufacturers and consumers, or traders and purchasers, alike to injustice. As a result productivity will stagnate and business activity will stop. This will surely endanger public and private interest alike. According to al-Shaybānī, this indicates that 'Umar and indeed all Muslim public authorities have no right to fix prices for Muslim traders or others, nor to compel sellers to do so.<sup>3</sup> On the other hand, the public authorities have the right to fix prices whenever they think it essential to do so, especially to prevent exploitation.<sup>4</sup> In another account

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1. Muw. Sh., p. 279; Muw. Y., p. 544; San., VIII, p. 207.

2. Zur., III, p. 299.

3. Muw. Sh., p. 279.

4. Muḥammad Bultājī, Manhaj 'Umar b. al-Khaṭṭāb fī al-Tashrī' (Dirāsa Mustaw'aba li Fiqh 'Umar wa Tanzīmātih), (Cairo, n.d.), p. 233.



of 'Umar b. al-Khaṭṭāb's encounter with Ḥaṭīb, he was said to have been holding two sacks of raisins at the market of al-Muṣallā.<sup>1</sup> 'Umar had asked him about their price. He had replied that he had fixed the price and preferred to sell each of them for one dirham on credit. 'Umar had said to him:

"I was told that a caravan was heading (to this market) from al-Ṭā'if carrying raisins. They would have based the price of their raisins on your price. Therefore, either increase the price or take your raisins home and sell them at whatever price you like."<sup>2</sup>

When 'Umar had returned to his house, he had second thoughts about what he had done to Ḥaṭīb. Later, he had gone to see Ḥaṭīb at his house and said:

"Actually, I am not absolutely sure about what I have said to you nor should I have judged you. What I have done to you was for no other purpose than the good of the people of the country. Now I say to you sell whenever and however you wish."<sup>3</sup>

According to al-Shāfi'ī, the people have control

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1. Al-Muṣallā was a place near Medina. See Yaq., IV, p. 556.

2. M. in Um., VIII, p. 191.

3. Ibid.

over their property and no public authority can interfere with it except when certain circumstances require a public authority to do so, and this case was not one of them.<sup>1</sup>

It may be suggested that the first act of 'Umar shows that the prohibition of price-fixing was applied to low or nominal prices as well, because a rich entrepreneur might operate the market by cutting prices and thus destroy smaller merchants and monopolies. He later reconsidered his first decision since he saw there was no danger in letting Ḥaṭīb sell his raisins with his own fixed prices. It may also be suggested that he had given the caravan from al-Ṭā'if time to sell its raisins, before letting the former operate in the same market, to avoid any injustice, by selling at low prices and causing losses to other fellow traders.

### The Successors

There is no evidence to show that any comment was ever made by the Successors on this subject. Therefore, it seems probable that all the Successors held the same view and agreed on what the Prophet had said and 'Umar had done.

### 3. Al-iḥtikār (Hoarding of foodstuff)

#### The definition of al-iḥtikār

Literally, al-ḥukra means waiting,<sup>2</sup> for an opportunity

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1. M. in Um., VIII, p. 191; cf. Hisb., pp. 24-25; Fata., XXIV, pp. 255-58.

2. Zur., III, p. 299; Lan., I, p. 615.

or collection and retention and collecting and withholding.<sup>1</sup> Legally, al-iḥtikār is storing foodstuffs up or withholding them in expectation of a rise in their prices.<sup>2</sup>

### Al-iḥtikār in pre-Islamic times

Some adept merchants in the Arabian peninsula in pre-Islamic times, bought a whole caravan loaded to capacity with goods and stored up these foodstuffs with the object of selling them in time of scarcity to gain maximum profits and dictate the price. Furthermore, some of the Arab merchants during this time bought commodities from any travellers who were carrying their foodstuffs to the market, and stored them up until the people needed them. They then sold these commodities at a very high price.<sup>3</sup>

### The Prophet and al-iḥtikār

Not all hoarders are sinners. The hoarder in fact contributes and he is considered as beneficent (muḥsin), i.e. he stores goods in periods of plenty and sells them in times of shortage when there is comparatively more demand for them. As such he is sharing in production,

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1. Lan., I, p. 615.

2. Tahanawī, II, p. 36; Zur., III, p. 299; Lan., I, p. 615.

3. Muf., VII, pp. 399-400.



for he preserves goods for a certain period and to maintain a constant supply in the market.<sup>1</sup> Those hoarders, however, who withhold goods in the market from a genuine consumer for the purpose of creating artificial scarcity and then taking undue advantage of the helplessness of poor people are to be condemned as sinners. Such selfish hoarders who are devoid of human feeling deserve condemnation, especially the hoarders of foodstuffs who exploit the plight of the poor.

The Prophet is reported to have condemned hoarders when he said:

"No one hoards but the traitors (i.e. the sinners)."<sup>2</sup>

However, in another Tradition, it is reported that the Prophet was safekeeping or storing some maintenance of foodstuffs for his family for one year, then he entrusted the remainder of his dates as the trust of property of God.<sup>3</sup> This shows that storing foodstuffs up for maintaining one's own family is not considered as hoarding.

### The Companions

It is from the Companions that we get a clear idea of the kind of legal discussions that were taking place

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1. Cf. Haz. M., IX, p. 64.

2. San., VIII, p. 204; cf. Kanz., IV, p. 55 (538).

3. San., VIII, p. 202.

on this subject.

‘Umar b. al-Khaṭṭāb said:

"There is no hoarding in our market, and men who have excess gold in their hands should not buy up one of God's provisions which he has sent to our courtyard and then hoard it up against us. Someone who brings imported goods through great fatigue to himself in the summer and winter, that person is the guest of ‘Umar. Let him sell what God wills and keep what God wills."<sup>1</sup>

‘Umar b. al-Khaṭṭāb also said:

"Do not sell in our market as a hoarder."<sup>2</sup>

In another report, ‘Umar b. al-Khaṭṭāb, the Caliph, was going to the mosque one day when he saw foodstuff scattered about and asked: "What is the food doing here?" The people replied: "It was brought to us." To which ‘Umar rejoined: "God would bless this foodstuff and the man who procured it." One man replied: "O Commander of the believers! But it has been hoarded." ‘Umar asked them: "Who hoarded it?" They replied: "It was Furūkh the client (mawlā) of ‘Uthmān and also a client of ‘Umar." Later, ‘Umar sent someone to ask these two men to speak to him. He asked them: "What induced you to hoard the food of Muslims?" They replied: "O Commander of the believers! We bought it with our

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1. Muw. Y., p. 544.

2. San., VIII, p. 206.

own money and then sold it." 'Umar then said: "I have heard that the Prophet said: "Whoever hoards food from Muslims, God will punish him with bankruptcy or with leprosy." Thereupon Furūkh was reported to have said: "O Commander of the believers! I give my word before God and before you that I will never do it again." However, 'Umar's client said: "Verily we bought it with our own funds and we will sell it."<sup>1</sup>

The above account indicates that 'Umar did not accept the principle of freedom of trade as a justification for hoarding, despite the argument of his client. The prohibition of hoarding had already been established by the Prophet, therefore no logical justification could be accepted. The client of 'Uthmān abandoned the practice of hoarding, but 'Umar's client continued this practice, since 'Umar merely advised him but took no practical steps to prevent it. 'Umar also considered that hoarding amounted to heresy or apostasy based on the following Qur'ānic verse:

"And any whose purpose therein (in Mecca) is profanity or wrong-doing will we cause to taste of a most grievous penalty."<sup>2</sup>

In spite of that, Abū Dharr al-Ghifārī used to keep or store some provisions for his family when there was a

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1. Ah. M., I, pp. 214-15 (135).

2. Q., 22:25. The above verse was supported by the Tradition which was reported that the Prophet had said: "Hoarding of foodstuff in the Holy Land is apostasy in it." 'Umar took this Tradition to support his idea. See Jam., XII, p. 35.



scarcity of food.<sup>1</sup> This indicates that the storing of foodstuffs for provision of the family in time of scarcity was allowed. However, the Companions continued to prohibit hoarding as opposed to storing. 'Uthmān b. 'Affān forbade hoarding,<sup>2</sup> and 'Abd Allāh b. 'Amr b. al-'Āṣ used to say:

"No man but the sinner (khāṭi'), or the oppressor (bāghī), waits to sell foodstuff in time of scarcity."<sup>3</sup>

### The Successors

Basically, every hoarder is cursed or damned (mal'ūn) and everyone who procures or imports foodstuff is blessed or prosperous (marzūq). This was held by Sa'īd b. al-Musayyib.<sup>4</sup> However, according to Sufyān al-Thawrī, there is no harm if a hoarder buys foodstuffs from market in the country in order to procure them. Moreover, there is no harm if a merchant sells his foodstuffs when there is comparatively more demand for them after storing them during a period of plenty, without any intention of jeopardizing the stability of their price in the market. In such cases, he is not considered as a hoarder.<sup>5</sup> This type of storing was, normally, practised by the Successors, for instance Ṭawūs used to store foodstuffs from his land two and

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1. San., VIII, p. 202.

2. Muw. Y., p. 544; I. Shu., III, pp. 1050-51.

3. San., VIII, p. 204.

4. Ibid.

5. Ibid.

three years in times of plenty, with the intention of selling them in a time of high demand.<sup>1</sup> According to Sa'īd b. al-Musayyib, hoarding is regarded as sinful where the purchased goods for storing were foodstuffs.<sup>2</sup> But Qatāda considered that linen, cloth or dry goods (al-bazz) were also included in the same category.<sup>3</sup>

4. The protection of purchasers' rights

In the Islamic law of business transactions, there were provisions for protection of purchasers from any injustices. Such provisions are as follows:

- i. Al-musāwama (Outbidding after a contract has been agreed)

Pre-Islamic outbidding

The Arab merchants had used to practise outbidding after a contract has been agreed between traders. This practice caused disputes and disagreement, especially between brothers or others.<sup>4</sup> This type of sale had

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1. San., VIII, p. 202.

2. Ibid., pp. 202-03.

3. Ibid., p. 203.

4. Muf., VII, p. 393.

commonly been practised in the market of Dūmat al-jandal<sup>1</sup> and at the international sea-port market of Dabā,<sup>2</sup> in Oman.<sup>3</sup>

The Prophet and al-musāwama

From the moment the vendor has accepted the offer of another person it is forbidden to outbid, even though the offer may not yet be irrevocable.<sup>4</sup> As a step to prevent this pre-Islamic practice, the Prophet is reported to have said:

"Do not let any of you bid against each other (outbidding in order to raise the price)."<sup>5</sup>

Mālik said:

"The explanation of the Prophet's words:

'Do not let any of you bid against each other,' is that it is forbidden for a man to offer a price over the price of

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1. Dūmat al-jandal was situated seven marḥalas between it and Medina from Damascus. It was between Birk al-ghimād in al-Shām (Syria) and Mecca. See for details in Muḥab, pp. 263-64; Abū 'Ubayd 'Abd Allāh b. 'Abd al-'Azīz al-Bakrī al-Andalusī, Kitāb Mu'jam Masta'jam min Asmā' al-Bilād wa al-Mawāḍi' (Cairo, 1366/1947), II, pp. 564-65; Yaq, II, p. 625.
  2. Muḥab., pp. 264-66.
  3. Yaq., II, p. 543.
  4. Cf. M. in Um., VIII, p. 186.
  5. Cf. J. Ma., II, p. 16; Muw. Sh., p. 277; Muw. Y., p. 569; cf. San. VIII, pp. 198-99.



his brother when the seller has inclined to the bargainer...."<sup>1</sup>

He continues:

"There is no harm, however, in more than one person bidding against each other over goods put up for a sale."<sup>2</sup>

Al-Shaybānī added:

"It is culpable to persuade a seller to cancel any contract which has been made between him and a third party in order to buy the goods at a high price, before the third party has bought or left them."<sup>3</sup>

The Companions and the Successors did not seem to have made any further statements on this topic.

ii. Al-najsh (Trickery)

The definition of al-najsh, its pre-Islamic practice and its prohibition

According to al-Shāfi'ī<sup>4</sup> and al-Shaybānī,<sup>5</sup> al-najsh means that one offers a high price for something without intending to buy it but just to cheat another person who really does want it.<sup>6</sup> A person may agree with the seller

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1. Muw.Y., p. 569-70; cf. Niha., II, p. 425.

2. Muw. Y., p. 570.

3. Muw. Sh., p. 277.

4. Um., III, p. 91.

5. Muw. Sh., p. 273.

6. Cf. Lis., VI, p. 351.

to offer high prices in front of the buyers to cheat them, in which case both this man and the seller are sinful. The seller may lie to the buyer that he, i.e. the seller, has previously bought the goods at a certain price which is in reality higher than the actual price.<sup>1</sup> This type of fraudulent transaction was widely practised among the Arabs in pre-Islamic times.<sup>2</sup> It was reported that the Prophet had prohibited al-najsh<sup>3</sup> or al-tanājush.<sup>4</sup> Mālik said:

"Al-najsh is to offer a man more than the worth of his goods when you do not mean to buy them and someone else follows you in bidding."<sup>5</sup>

#### The Companions and the Successors

No comment appears to have been made by the Companions. But among the Successors, only 'Umar b. 'Abd al-'Azīz forbade al-najsh in a sale.<sup>6</sup>

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1. Cf. Um., III, p. 91; cf. Faiq, III, p. 68.
  2. Muf., VII, pp. 389-90.
  3. Muw. Sh., p. 272; Muw. Y., p. 569-70; San., VIII, p. 199.
  4. 'Abd Allāh b. 'Umar, Musnad, ed. Aḥmad Rātīb 'Armūsh, (Beirut, 1401/1981), p. 68.
  5. Muw. Y., p. 570.
  6. San., VIII, p. 202; Haz. M., VIII, pp. 448-49.

iii. Ikhfā' al-'ayb (Concealing of defects) and al-ghishh (cheating)

Pre-Islamic practice of concealing defect and cheating and the Prophet

These two practices had commonly been carried out and widely spread among the traders in pre-Islamic times.<sup>1</sup> It was reported that, one day, the Prophet was passing by a man who was selling foodstuff. The Prophet asked him, "How is your business?" The man told the Prophet about his business. Then, it was revealed to him, "Put your hand in it (foodstuff)." He put his hand in it and his hand got wet.<sup>2</sup> After realizing the man was concealing defects and cheating, the Prophet said:

"Surely, whoever deceives, in business transactions, is not (or does not behave like) one of us."<sup>3</sup>

The Companions and the Successors

Neither did the Companions make any further statements about the prohibition of the above wrong-doings in business transactions. But Shurayh<sup>4</sup> and Ma'mar b. Rāshid,<sup>5</sup> two of the Successors, continued to disallow such practices.

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1. Umd., X, p. 242; Muf., VII, pp. 396-99.

2. Ah. M., XIII, p. 18 (7280).

3. Han. M., p. 163 (346); J. Ma., II, p. 20; Ah. M., XIII, p. 18 (7280).

4. San., VIII, p. 109.

5. Ibid., p. 196.



iv. Exacting full measure and weight<sup>1</sup>

Pre-Islamic mal practice of measure and weight and the Prophet

The Medinans had been notorious, in pre-Islamic times, for giving short measure.<sup>2</sup> The Prophet is reported to have said:

"Weigh (and level the scale) and get it right."<sup>3</sup>

The Prophet is also reported to have said:

"O Muhājirūn (the emigrants)! There are five things which may befall you and I pray God that you may escape them: moral decay never openly shows itself among a people but they suffer from pestilence and disease such as their fathers have never known; they do not use light weights and measures but they are smitten by famine and the injustice of rulers...."<sup>4</sup>

The above Traditions show that traders have to be fair to purchasers in exacting measures and weights.

The Companions

It was reported that 'Abd Allāh b. 'Abbās had said:

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1. For the Qur'ānic injunctions on this subject, supra Introduction, pp. 25 and 30.
  2. T.J., XXX, p. 91; Jam., XIV, p. 248.
  3. San., VIII, p. 68.
  4. IH., IV, p. 205.

"O you non-Arabs, assembled together!  
You are entrusted with two responsibilities,  
which have destroyed other people before  
you, they are measure and weight."<sup>1</sup>

‘Alī b. Abī Ṭālib came across a man who was weighing some saffron. He was weighing out more than the balance and then reducing the amount to make the balance equal. ‘Alī said: "Weigh the saffron out equally first and then make it heavier as you wish." According to al-Qurṭubī, the order of ‘Alī was to level the scale first to be accustomed to it and then to distinguish the obligatory from supererogatory acts.<sup>2</sup> Once, ‘Abd Allāh b. ‘Umar passed by a trader and he said: "Fear God and be absolutely equitable with measure and weight..."<sup>3</sup> In addition, according to al-Ṣan‘ānī, ‘Abd Allāh b. ‘Umar saw a man who appeared to be weighing out something with excess. ‘Abd Allāh said to him: "Woe unto you! What is this?" The man said: "God ordered you to be fair (perfect)." ‘Abd Allāh replied: "But God prohibited aggression."<sup>4</sup> ‘Abd Allāh b. Mas‘ūd passed by a man who

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1. According to al-Qurṭubī, ‘Abd Allāh b. ‘Abbās singled out the non-Arabs on this matter because they used both weight and measure. On this basis one can distinguish between the people of Mecca who only used weight in their business transactions and the people of Medina who used only measurement. See Jam., XIX, p. 251. See also T.J., XXVII, p. 118; San., VIII, p. 67.
  2. Jam., XIX, p. 251.
  3. Ibid., pp. 251-52.
  4. San., VIII, p. 67.

was weighing the commodity and the weight was in excess, then 'Abd Allāh levelled the scale and said: "What a perfect (or an excellent) weigh after you have got it right, you may add whatever you wish."<sup>1</sup> The above reports demonstrate that the Companions were very particular about weight and measure in any trade or business transaction, as had been the Prophet.

### The Successors

According to Ibrāhīm al-Nakha'ī, there was no harm in making the weight of goods heavier in favour of a purchaser.<sup>2</sup> Possibly this statement indicated that anyone could make his weight of goods heavier, in favour of a purchaser, in any business transaction, after first weighing out the goods to make the balance equal. This was suggested by the Companions, in order that the level of the scale should be established first. In doing so a man could distinguish between obligatory and super-erogatory acts. However, 'Ikrima gave strong advice, especially to merchants, to be equitable in usage of weight and measure and to fear God's punishment.<sup>3</sup>

v. Al-kharāj bi al-ḍamān (The profit belongs to him who bears responsibility)

The purchaser has the right to return goods after

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1. San., VIII, p. 68.

2. Ibid.

3. Jam., XIX, p. 251.



he has discovered any original defect,<sup>1</sup> and all the right of usufruction and other benefit from the goods during his possession belongs to him. The Prophet is reported to have said:

"The profit belongs to him who bears responsibility."<sup>2</sup>

It seems that this practice was of Islamic origin.

### The Companions and the Successors

No comment seems to have been made by the Companions, but the Successors made a few legal statements on this subject. Among them were 'Urwa b. al-Zubayr who agreed that the purchaser had the right of returning defective goods.<sup>3</sup> Further, Shurayh ruled that the purchaser of a house was not liable to compensate for any of its revenue, if he returned it to the first owner,<sup>4</sup> as the result of an invalid transaction. However, according to al-Thawrī, the buyer was liable to return an animal along with any growth, if for any reason of imperfection in a legal transaction an animal had to be returned. This included wool and milk. In the case of monetary transactions or agricultural produce, if they were consumed or damaged the price or value only of the original had to be

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1. Risa., p. 556.

2. Ibid.

3. San., VIII, pp. 176-77.

4. Ibid., p. 176.

returned.<sup>1</sup> 'Umar b. 'Abd al-'Azīz added that any yield, service or produce should be returned together with the defective goods.<sup>2</sup>

vi. Wad' al-jawā'ih (Remission in the payment of yield stricken by calamity or disaster)

Wad' al-jawā'ih is the withdrawing of any contract between the parties, after a crop has been damaged by pests, epidemic or natural calamities. It is assumed that this practice was of Islamic origin, because there is no evidence to show that it had been practised in pre-Islamic times. Regarding wad' al-jawā'ih, several Traditions were reported. They were:

i. The Prophet is reported to have ordered remittance of payment of any yield stricken by calamity.<sup>3</sup>

ii. The Prophet is reported to have said:

"If you have bought from your brother any fruit, which was then damaged by any calamity (disease), you are forbidden to take anything (the commodity) (from him). For what (exchange) shall you take your brother's property without any right?"<sup>4</sup>

iii. The Prophet is also reported to have said:

"Whoever has bought the fruit, which was

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1. San., VIII, pp. 177-78.

2. M. in Um., VIII, p. 180; San., VIII, p. 178.

3. Um., III, p. 57; Tar., II, p. 151.

4. Mud., V, p. 32; cf. Um., III, p. 58; Haz. M., VIII, p. 384.

then damaged by any calamity and has lost a third of the fruit, the owner of the property (the vendor) is obliged to pay the rebate."<sup>1</sup>

However, this subject was discussed in more detail by later generations. Mālik<sup>1</sup> ruled that crop damage was whatever causes loss of a third or more for the purchaser. Anything less was not counted as crop damage.<sup>2</sup>

### The Companions

‘Alī b. Abī Ṭālib ruled that crop damage from whatever causes existed where loss amounted to a third or more for the purchaser. Anything less was not counted as crop damage. Crop damage was caused by rain (flood), wind, locust or fire.<sup>3</sup> Al-Shāfi‘ī considered that such disaster could be caused by nature or by man.<sup>4</sup>

It was also reported that Sa‘d b. Abī Waqqāṣ had sold an orchard which had belonged to himself. This orchard had later been stricken by a crop disaster so that the purchaser had subsequently taken the price or value of the orchard from Sa‘d.<sup>5</sup> According to al-Shāfi‘ī remission in the form of payment should be made after the purchaser has possessed such crops or fruits and has

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1. Mud., V, p. 31.
  2. Muw. Y., p. 519.
  3. San., VIII, p. 263.
  4. Um., III, p. 60.
  5. Ibid., p. 59.



found defects in them. However, crop damage is not considered as a defect in goods. In such cases the buyer is allowed to take back his defective fruits or to give back the price to the purchaser.<sup>1</sup>

According to al-Shaybānī, Sa'd b. Abī Waqqās was reported to have purchased grapes from 'Abd al-Rahmān b. 'Awf in al-'Aqīq.<sup>2</sup> Later, Sa'd produced evidence that the grapes he had bought had been eaten by locusts (all of them or most of them). The case was brought before 'Uthmān b. 'Affān, the Caliph, who decided that 'Abd al-Rahmān b. 'Awf should pay compensation at the full price to Sa'd. 'Uthmān said:

"This is part of God's property which He has bestowed on this (Sa'd) (by returning this property to him in the trial) and He has tested you ('Abd al-Rahmān) in this way."<sup>3</sup>

'Alī b. Abī Tālib opined that crop damage was whatever causes loss of a third or more for the purchaser.<sup>4</sup>

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1. Um., III, p. 59.

2. Al-'Aqīq was situated ten miles from Medina. Sa'd lived and died here. See IS., VI, p. 13. According to Ibn al-Athīr, it was an oasis in Dhāt-'īrq near Medina, see Niha., III, p. 278.

3. Huj., II, pp. 557-59; cf. Haz. M., VIII, p. 386.

4. Haz. M., VIII, p. 386.

### The Successors

According to al-Thawrī, anyone who had sold fruit after showing evidence of ~~its~~ quality had to replace or remit it, if the purchaser found the fruit had been stricken by disaster.<sup>1</sup> But according to Ma'mar b. Rāshid, the people of Medina remitted the payment of yield stricken by disaster, where loss amounts to a third or more for the purchaser. The remission was made for yield or fruits only, not for other goods.<sup>2</sup> Sulaymān b. Yasār was asked about the remission in the payment for yield stricken by disaster. He based his ruling on the precedent of Sa'd b. Abī Waqqāṣ<sup>3</sup> who used to ~~give~~ the remission of payment in such a case from 'Abd al-Raḥmān b. 'Awf, after 'Uthmān b. 'Affān had ordered him to do so. No other Companions objected to this move and there is no contradicting evidence to show otherwise.<sup>4</sup> 'Umar b. 'Abd al-'Azīz,<sup>5</sup> al-Qāsim b. Muḥammad, Sālim b. 'Abd Allāh, 'Alī b. al-Ḥusayn, 'Aṭā' b. Abī Rabāḥ and Sulaymān b. Yasār<sup>6</sup> were of the opinion that the price of yield stricken by disaster could only be remitted by the

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1. San., VIII, p. 623.

2. Ibid., pp. 622-63.

3. Supra chapter II, pp. 76-77.

4. Huj, II, pp. 560-61; Haz. M., VIII, p. 386.

5. Muw. Y., p. 519; Mud., V, p. 32; Haz. M., VIII, p. 386.

6. Haz. M., VIII, p. 386.

purchaser where the loss amounted to a third or more. According to 'Aṭā' b. Abī Rabāḥ, such calamities were flood, frost, locusts, wind or fire.<sup>1</sup>

5. The protection of the traders' rights

- i. A sale concluded between a townsman and an inhabitant of the desert or of the country and to meet the riders (or traders) on the road for the purpose of getting undue advantage (ṭalaqqī al-jalab or ṭalaqqī al-rukbān)

The above contracts in pre-Islamic times

In pre-Islamic times, the following circumstances arose:

- a. A townsman might see a stranger arriving with objects of prime and general necessity for a sale at the current rate of the day, and he might persuade that stranger to transfer the whole of the goods to himself, to retail them at a higher price; and
- b. A shrewd townsman might go out of town to meet people bringing their goods to town and buy these products at the cheapest rate before these people became aware of the current rate and sell them at the highest or exorbitant price,<sup>2</sup> or the entrepreneurial practice of tradesmen intercepting an incoming caravan, which has not yet arrived at the centre of a town, and making enormous

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1. Mud., V, p. 32.

2. Muf., VII, pp. 394-96 and 400; cf. Um., VIII, pp. 629-30.



profits from dealing with the caravan members because of the latter's lack of knowledge of the level of local prices.<sup>1</sup> They were known as talaqqī al-jalab, talaqqī al-rukbān, talaqqī al-sila' or talaqqī al-buyū'.<sup>2</sup>

In relation to this unjust practice, there are Traditions as follows:

i. The Prophet is reported to have said:

"The townsman should not sell on behalf of a man from the desert (with a view to taking advantage of his ignorance of the market conditions of the city)"<sup>3</sup>

In another Tradition,

"Even if on his own father's or brother's behalf."<sup>4</sup>

The prohibition of any transaction between a townsman and desert-dwellers also implies the inclusion of transactions between families of the desert and families of the town.

ii. The Prophet is reported to have said:

"Do not go out to meet the traders (from a caravan carrying merchandise) and whoever meets him and buys goods from him, whenever

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1. C. Com., p. 72.

2. San., VIII, pp. 199-201; Haz. M., VIII, pp. 449-50; Muf., VII, p. 394.

3. J. Ma., II, pp. 9 and 18; Muw. Y., p. 569; Um., III, pp. 92-93; San., VIII, pp. 198-99.

4. San., VIII, p. 200.

he (the trader) arrives at the market  
he has the right of option."<sup>1</sup>

iii. The Prophet is reported to have forbidden going out to meet riders, i.e. traders, carrying merchandise, until it is brought into the market.<sup>2</sup>

The prohibition of this transaction is general, whether between a townsman and a desert-inhabitant or others. According to al-Shaybānī, such an act will cause difficulty and hardship to other countrymen, but if there are lots of goods and it does not cause any difficulty, such an act is permitted.<sup>3</sup>

#### The Companions

The legal rulings of the Companions on this subject are as follows:

a. 'Abd Allāh b. 'Abbās ruled on this matter that he declared a townsman should not become the broker of an inhabitant of the desert.<sup>4</sup> 'Umar b. al-Khaṭṭāb gave the following order to merchants. He said that they should inform desert traders about the market price of their goods and lead them to the market.<sup>5</sup> According to al-Sha'bī, the emigrants (al-Muhājirūn), namely 'Umar b. al-Khaṭṭāb,

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1. Haz. M., VIII, p. 449.

2. Muw. Sh., p. 272.

3. Ibid., p. 273.

4. San., VIII, p. 199.

5. San., VIII, p. 200; Haz. M., VIII, p. 454.

Anas b. Mālīk, 'Abd Allāh b. 'Abbās, Abū Hurayra and Talḥa b. 'Ubayd Allāh,<sup>1</sup> did not allow such practice, i.e. the transaction between a townsman and a desert dweller.<sup>2</sup> The above reports suggest that the transaction between a townsman and a desert dweller was not permitted, even becoming his broker except when the traders from the desert know the price and conditions of the market. This law had been promulgated by the Prophet and continued to be practised by the Companions to avoid any sort of unfairness in business transactions towards new traders, especially those from the desert.

b. On talaqqī al-jalab or talaqqī al-rukbān, Abū Hurayra is reported to have said:

"It is forbidden to meet the riders, i.e. the traders, on the road (for the purpose of getting undue advantage). Whosoever meets a trader on the road and he buys goods from this trader, the vendor has the right of option or cancellation of such a deal when he arrives at the market."<sup>3</sup>

According to Ibn Ḥazm, there was no evidence to show that any Companion was in disagreement with the above ruling by Abū Hurayra.<sup>4</sup>

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1. Haz. M., VIII, p. 454.

2. Ibid.

3. San., VIII, p. 201; Haz. M., VIII, pp. 449 and 454.

4. Haz. M., VIII, pp. 449-50.



The Successors

a. It may be concluded that Muḥammad b. Sīrīn, Ibrāhīm al-Nakha'ī, Sa'īd b. al-Musayyib, Tāwūs, al-Sha'bī and 'Aṭā' b. Abī Rabāḥ prohibited any contract of transaction concluded between a townsman and a desert inhabitant, i.e. in specific words a townsman became the broker of a desert dweller or a country trader.<sup>1</sup> This was also held by 'Umar b. 'Abd al-'Azīz.<sup>2</sup> However, Mujāhid allowed such transactions or contracts,<sup>3</sup> provided the desert dweller knew the market price and the situation of the market. This ruling was agreed by Ibrāhīm al-Nakha'ī. The latter based his opinion on the ruling of 'Umar b. al-Khaṭṭāb that the merchants from the desert should be informed of the market price and they should have been taken to the market to inspect the conditions of the market.<sup>4</sup> According to al-Ḥasan al-Baṣrī, there was no harm in buying goods from the desert dweller, but it was prohibited to become a broker or to sell the goods on his behalf.<sup>5</sup>

b. It should also be concluded that Muḥammad b. Sīrīn was of the opinion, in the case of talaqqī al-jalab or

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1. San., VIII, pp. 198-201.

2. Haz. M., VIII, p. 454.

3. San., VIII, p. 201.

4. Ibid., p. 200.

5. Haz. M., VIII, p. 454.

talaqqī al-rukbān, that the traders had the right of option of revocation of contract on arrival at the market, if they were not satisfied with the transaction which had been concluded.<sup>1</sup> Further, 'Umar b. 'Abd al-'Azīz considered such a contract as trickery (najsh). In such a case, the transaction was invalid.<sup>2</sup> To explain further, al-Sha'bī said that the distance, in the case of talaqqī al-jalab or talaqqī al-rukbān, between the market and the place where the transaction was concluded had to be less than the distance at which a traveller was allowed to shorten his prayers.<sup>3</sup> If the transaction was made at a distance further than that it would be valid and permissible.<sup>4</sup>

ii. Any excess of transacted goods belongs to the traders

'Ikrima, al-Sha'bī, al-Ḥakam b. 'Utayba, Muḥammad b. Sīrīn and al-Thawrī all held the opinion that if excess goods were contracted, the purchaser was liable to return that excess to the vendor. If, on the other hand, the transacted goods were found, with the purchaser, to be short or less than the amount of goods contracted, the vendor was, likewise, liable to compensate such shortage to the former.<sup>5</sup> This view was elaborated by the Successors. Neither the

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1. San., VIII, p. 201; Haz. M., VIII, pp. 449-50.

2. San., VIII, pp. 201-02; Haz. M., VIII, p. 450.

3. San., VIII, p. 201.

4. Haz. M., VIII, p. 450.

5. San., VIII, p. 133.

Prophet nor the Companions made any ruling on this matter or there does not seem to be any earlier discussion of this matter.

iii. Bay' al-mujīzān (A bargain involving two bidders)

If a price has been offered by two prospective buyers, the contract should be made with the first. But if the first bidder is not known, or absent, then the transacted goods will be given to the one who is holding them. This was the opinion of Shurayh and Muḥammad b. Sīrīn.<sup>1</sup> Al-Thawrī, however, added that if the first bidder was not known, the goods would be returned to the vendor.<sup>2</sup> It seems that neither the Prophet nor the Companions give any precedent for such sales. This was an extended ruling which was introduced by the Successors.

iv. Bay' al-mukrah (A sale by force or under duress, force-majeure)

A sale must be made on the basis of mutual consent. It was mentioned in the Qur'ān that:

"... But let there be amongst you trade by mutual good will."<sup>3</sup>

It therefore follows that sale by force was invalid.

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1. San., VIII, p. 194.

2. Ibid.

3. Q., 4:29.



This ruling was made by Ṭāwūs.<sup>1</sup> Shurayḥ emphasized that a sale by oppression (al-idṭihād) or pressure (al-ḍaghṭa) was also invalid.<sup>2</sup> Further, Ibrāhīm al-Nakha'ī considered invalid any contract made by any sort of punishment on the vendor.<sup>3</sup>

It appears that the Companions have left this subject without further comment.

v. Al-khalāṣ fī al-bay' (Settlement in a sale or liquidation of a sale)

If a sale is made by another person, without any authority from the real owner, negotiorium gestio, then such a transaction is invalid. In this case, when the owner produces the evidence against such a sale, the goods have to be returned to the owner by the person who is responsible for such sale and the capital to the buyer by the seller. This was held by Ṭāwūs and Shurayḥ.<sup>4</sup> According to al-Thawrī, no monetary charge would be made against the buyer.<sup>5</sup> If in such a sale a condition of settlement or other conditions are made, and the owner consents to the sale, the sale is valid but the conditions are void or null. This was held by Ibrāhīm

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1. San., VIII, p. 62.

2. Ibid., p. 61.

3. Ibid., p. 62.

4. Ibid., pp. 192-93.

5. Ibid., p. 193.

al-Nakha'ī.<sup>1</sup> There does not appear to be any earlier discussion of this subject.

6. The protection of both parties in a contract

Bay' al-muzāyada (Sale by auction)

Its definition, origin and the Prophet

According to Mālik, there is no harm in more than one person bidding against another over goods put up for sale.<sup>2</sup> According to Ibn Ḥazm, such a sale is not an outbidding after a contract has been agreed (al-musāwama),<sup>3</sup> neither is <sup>it</sup>trickery (al-najsh).<sup>4</sup> Such a contract was called bay' al-muzāyada (sale by auction) which had commonly been practised by the Arabs in pre-Islamic times.<sup>5</sup> The Prophet is reported to have bought a man's cup and a saddle-blanket by auction.<sup>6</sup>

The Companions and the Successors

No comment seems to have been made by the Companions. Among the Successors, Mujāhid permitted such a sale, whether the commodity was inherited or not, sold to beneficiaries or otherwise. He said weapons were usually sold by auction<sup>7</sup> among the Muslim community. According to 'Aṭā' b. Abī Rabāḥ, he saw

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1. San., VIII, p. 194.

2. Muw. Y., p. 570.

3. Haz. M., VIII, p. 448.

4. Supra chapter II, pp. 66-69.

5. Muf., VII, p. 395.

6. Siyar, IV, p. 1212 (2266); Haz. M., VIII, p. 448.

7. San., VIII, pp. 236-37.

the people seeing no harm in selling war booty by auction (bay' al-muzāyada).<sup>1</sup> But Muḥammad b. Sīrīn did not allow selling inherited goods by auction other than between the beneficiaries.<sup>2</sup> It may be assumed that Muḥammad b. Sīrīn did not allow such transaction if it was made before division of the inherited property and allowed that transaction, if the property had not yet been divided, to the beneficiaries only.

It appears that, on the one hand, this contract rejects any element of outbidding which may cause injustice to other buyers, but, on the other hand, such a contract may profit the vendor who may raise the price from its original one as a result of competing bidders. Therefore, this transaction may give advantageous results to both parties.

## II. Voidable Contracts

Al-khiyār (The right of option or cancellation, optio)

The definition of al-khiyār

Literally, the word al-khiyār denotes a choice on the part of the holder of the right of option, who may either confirm the act or render it void.<sup>3</sup> Legally, al-khiyār means the option or right of withdrawal, i.e.

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1. Bukh., III, p. 198.

2. San., VIII, p. 236.

3. A.M. Delcambre, EI<sup>2</sup>, vol. V, p. 25; cf. Lan., I., p. 830.



the right for the parties involved terminating the legal act unilaterally. An option is not void in origin, but its validity is nevertheless precarious and subject to confirmation. In Western law, this option corresponds to an act liable to a suspensory or resolutory condition, in accordance with the nature of option.<sup>1</sup>

The origin of al-khiyār and its practice in pre-Islamic times

Al-Ṣan'āni recorded a Tradition which was related by Ṭāwūs. In this Tradition, the Prophet is said to have bought a camel from a Bedouin, before his prophethood. After the transaction, the Prophet had said to the Bedouin:

"Take your right of option (ikhtar)"

He then looked at the Prophet and said: "May God perpetuate your life. Who are you?" After his prophethood, the Prophet founded (or acknowledged) the law of al-khiyār after sale.<sup>2</sup>

The above Tradition shows that the practice of al-khiyār had been recognized by the Arabs before Islam. Al-khiyār also had been commonly practised among them before the advent of Islam in Arabia.<sup>3</sup>

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1. A.M. Delcambre, EI<sup>2</sup>, vol. V, p. 25.

2. San., VIII, p. 50.

3. Muf., VII, pp. 402-03.

The divisions of al-khiyār may be epitomized, as is discerned from the Traditions of the Prophet as follows:

1. Khiyār al-faskh (Unconditional option to revoke)

Both the buyer and the seller have the option to confirm, cancel or rescind a transaction. A contract may be revoked for various reasons. The unconditional option to revoke may be divided:

a. Khiyār al-majlis (The option of the session)

The definition of khiyār al-majlis and the Prophet

Al-majlis (a session) is the period during which contracting parties devote themselves to the business in hand and is terminated by any event, such as physical departure from the place of business, which indicates that negotiations are concluded or suspended.<sup>1</sup> The right of option of session (sitting), called khiyār al-majlis, is the inalienable right to repudiate unilaterally a contract concluded by both parties, so long as they have not yet separated, when the contract is inter praesentes. Such a contract is a bilateral transaction.<sup>2</sup>

The Prophet is reported to have said:

"Both parties in a business transaction have the right of option as long as

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1. C. His., pp. 237-38.

2. Intro., p. 145.

they have not separated, except if it is an optional sale."<sup>1</sup>

The Prophet is also reported to have said:

"The sale (is contracted) with mutual consent (tarād) and the right of option (al-takhyīr) is after the conclusion of a contract (ṣafqa),"<sup>2</sup>

and he is reported to have advised the people of al-Baqī',<sup>3</sup>

"The parties in a contract of business transactions should not separate except after mutual agreement (has been made)."<sup>4</sup>

However, according to Mālik, there is no specified time limit nor any specific matter which is applied in this case, in Medina.<sup>5</sup> N.J. Coulson comments on this matter that this is one of the occasions on which the reported legal precedents of the Prophet or later authorities were rejected by the early Medinan scholars

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1. Muw. Sh., p. 277; Mun. Y., p. 559; cf. San., VIII, pp. 50-51. According to al-Shāfi'ī, this tradition was reported to him by Yahyā b. Ḥassān, a reliable and trustworthy transmitter. See Um., III, p. 4.
  2. San., VIII, p. 51.
  3. Al-Baqī' is a place in Medina. Cf. Yaq., I, p. 703.
  4. San., VIII, pp. 51-52.
  5. Muw. Y., p. 559; cf. Mud., IV, p. 188. According to al-Suyūṭī, this Tradition was transmitted by Mālik, but he did not practise it. See Tanwir, II, p. 79.



when it ran counter<sup>to</sup>/their currently accepted doctrine,<sup>1</sup> or established traditions. Al-Zurqānī stated that the scholars had been agreed that the Tradition was well attested, and most of them followed it, except Mālik and Abū Ḥanīfa and their followers. According to some of the scholars, the claim of a Medinan consensus was not substantiated, especially after the decision to act upon the Tradition was related explicitly from the two of the prominent scholars of Medina, i.e. Sa'īd b. al-Musayyib and al-Zuhrī. Moreover, no other reports against acting upon the Tradition is explicitly related from other scholars of Medina.<sup>2</sup>

The right of option does not exist in the following two cases:

a. If the parties declare their approval of the contract. If only one does so then he loses his right of option, but the other party retains his right until such time as he makes a similar declaration.<sup>3</sup>

b. If the parties separate without any express reservation. The right of option remains, however, as long as the separation has not taken place; even though the parties remain together for a long time.<sup>4</sup> Normally customary practice ('urf) indicates what is to be understood

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1. C. His., p. 46. See Huj., II, pp. 677-94; cf. Orig., pp. 64-65.

2. Zur., III, p. 321.

3. Cf. Um., III, pp. 4-5; cf. Haz. M., VIII, p. 352.

4. Um., III, pp. 4-5 and 7; M. in Um., VIII, p. 172.

by the word "separation".<sup>1</sup> However, according to al-Shāfi'ī in the case of sudden death of one of the parties, the right of option is transferred to his heir.<sup>2</sup> The prime purpose of the doctrine of khiyār al-majlis is that the parties are sure exactly when the session is over. This doctrine is not applicable to the case of contracts inter absentes. It is suggested that, in such a case, the only proper method for the parties to have a time for reflection and assessment by their agreeing upon a specified period of option to rescind or to revoke the contracts.<sup>3</sup>

#### The Companions

The basis for giving the right of option <sup>of the session</sup> in a contract was reported to have been made by the Prophet who had said:

"Both parties in a business transaction have the right of option as long as they have not separated, except if it is an optional sale."<sup>4</sup>

With this Tradition, 'Abd Allāh b. 'Umar followed the instruction of the Prophet. Whenever he bought any goods, he walked away from the place where the transaction was stipulated, for a short while to break the

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1. C. Com., p. 59.

2. Um., III, p. 5; M. in Um., VIII, p. 173.

3. C. Com., pp. 62-63.

4. Muw. Sh., p. 277; Muw. Y., p. 559.

time of contact, and then he came back to the place.<sup>1</sup>

‘Abd Allāh b. ‘Umar also said:

"I bartered my property in Khaybar to ‘Uthmān b. ‘Affān (the Commander of the faithful believers) for his property in al-Wādī.<sup>2</sup> When we finished the deal I left immediately and went out of his house lest he should cancel the deal, because the Tradition (from the Prophet) was that the buyer and the seller had the option of cancelling the contract unless they separated."<sup>3</sup>

According to Ibn Ḥazm, most of the Companions agreed with the principle that the right of option existed until the parties separated.<sup>4</sup>

Some of the Companions like Abū Hurāyra,<sup>5</sup> ‘Alī b. Abī Ṭālib, al-‘Abbās b. ‘Abd al-Muṭṭalib, ‘Umar b. al-Khaṭṭāb and ‘Uthmān b. ‘Affān agreed that the right of option existed until the parties separated.<sup>6</sup> Such a separation is regarded as an important point to determine the procedure of having a right of option.

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1. Um., III, p. 4; San., VIII, p. 51.

2. Al-Wādī is possibly Wādī al-qurā, a district near Medina. See Umd., XI, p. 232.

3. Haz. M., VIII, pp. 353-54.

4. Ibid., p. 354.

5. San., VIII, p. 51.

6. Haz. M., VIII, pp. 353-54.



### The Successors

Any claim of revocation in a transaction which was not valid or which had been made without the consent of the second party, would not be acceptable. The right of option existed as long as the parties to the contract, which was made with mutual consent, did not separate. This was the view of Ṭāwūs,<sup>1</sup> Shurayḥ,<sup>2</sup> 'Aṭā' b. Abī Rabāḥ, al-Ḥasan al-Baṣrī<sup>3</sup> and Sa'īd b. al-Musayyib.<sup>4</sup> In this case, any contract of sale claimed by any party should be supported by two notary witnesses, who have the necessary quality of probity. They should have agreed and consented to the contract before separation or the contract would be an optional sale. This was held by Shurayḥ.<sup>5</sup> Further, according to al-Thawrī the time of consent should be emphasized during the contract.<sup>6</sup> This opinion followed the instruction of the Prophet, who ruled that the right of option did not exist after separation. Ibrāhīm al-Nakha'ī, however, considered that a transaction with words, which showed that they agreed to the contract, was valid

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1. San., VIII, p. 53.

2. T.J., V, p. 33.

3. Umd., XI, p. 277.

4. Haz. M., VIII, p. 354.

5. Um., III, p. 4.

6. San., VIII, p. 53.

and was therefore irrevocable, even if they did not separate.<sup>1</sup> Following this view, Ibrāhīm al-Nakha'ī considered the separation from an oral or a verbal agreement (mantiq al-bay') between the two parties would be sufficient grounds for irrevocability of a contract, and that physical separation was not necessary.<sup>2</sup> It is possible that Ibrāhīm al-Nakha'ī's view reflected that of 'Umar b. al-Khaṭṭāb who said that an oral contract should be binding, because all Muslims were bound by their contractual agreements.<sup>3</sup> Therefore, the contract itself is counted as valid and it cannot be revoked, unless it is optional, in khiyār al-shart (the right of revocation as has been stipulated in the contract).

Muḥammad b. Sīrīn clarified further that any transaction which was paid for in cash, with silver (al-wariq), could not be mixed with other transactions till the paid sale was already settled, i.e. whether it was taken or returned to the vendor.<sup>4</sup> This demonstrates that any payment for goods in a transaction should be settled first, whether the transaction has been cancelled or not. Otherwise a new contract, whether by cash or on

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1. San., VIII, p. 52.

2. Muw. Sh., p. 277; San., VIII, p. 52.

According to al-Shaybānī, this view was held by Abū Ḥanīfa. See Muw. Sh., p. 277.

3. San., VIII, pp. 52-53.

4. San., VIII, p. 54; Haz. M., VIII, p. 374.

credit, cannot be made. Furthermore, Muḥammad b. Sīrīn, Shurayḥ, Ibn Jurayj and 'Aṭā' b. 'Abī Rabāḥ disallowed any sale by cash to be made at a different time, other than the fixed time,<sup>1</sup> which was already stipulated. Disapproval of such conduct may have been expressed to assure the time of acceptance. Then the right of revocation could be granted to both parties. Otherwise the time of acceptance and the right of revocation could not be secured. Al-Ḥasan al-Baṣrī was of the opinion that if the purchaser had taken the goods in an optional transaction, then the goods were damaged, he was liable to replace them, if the price had been fixed, otherwise he was considered as a trustee and there was no liability on him.<sup>2</sup>

b. Khīyār al-shart (Option by stipulation)

In an option by stipulation, the contracting parties may reserve the right of conventional option by special stipulation, i.e. the faculty of cancelling the contract within a certain time. Such stipulation may be made either by one of the contracting parties or by both.<sup>3</sup> A stipulated and agreed period of time during which either one or both parties may revoke the contract, stands as a valid stipulation according to general

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1. San., VIII, p. 54.

2. Haz. M., VIII, p. 374.

3. Naw., p. 130.



principles because it strengthens the basic purpose of certainty of contractual commitment.<sup>1</sup>

The ownership of the article sold remains with the vendor, if a right of option has been stipulated by him; or with the purchaser if the stipulation was his; and it remains in suspense if both made the stipulation. However, if the contract is not later cancelled by the exercise of the right of option, then the purchaser of the goods is considered to have been the owner from the time the bargain was concluded; if, on the contrary, the contract is cancelled, the vendor's ownership is considered to have been uninterrupted.<sup>2</sup> The Prophet is reported to have said:

"Both the buyer and the seller have the option of cancelling or confirming the bargain, as long as they are still together, unless they separate or one of them gives the other the option of keeping or returning the articles and a decision is concluded then, in which case the bargain is considered as final. If they separate after the bargain and none of them has rejected it, then the bargain is rendered final."<sup>3</sup>

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1. C. Com., p. 63.

2. Naw., p. 131.

3. Ah. M., VIII, pp. 247-48 (6006); Haz. M., VIII, p. 363.

### The Companions

The contracting parties have the right of revocation of sale if it has been so stipulated in the contract (khiyār al-sharṭ). In this matter, the contracting parties may reserve the right of conventional option by special stipulation, i.e. the faculty of cancelling the contract within a certain time. Such stipulation may be made either by one of the contracting parties or by both.<sup>1</sup> In this respect, 'Umar b. al-Khaṭṭāb said:

"The sale is from a conclusion of a contract (al-ṣafqa). Otherwise, the sale is optional and a Muslim is bound by his own contractual agreement."<sup>2</sup>

According to Sufyān al-Thawrī, a contract (al-ṣafqa) here means an oral contract.<sup>3</sup> This report indicates that 'Umar held the opinion that any sale should be made with the consent of both parties. In addition, they also had the right of option to revoke their contract, but they should stick to their contractual agreements which they had stipulated in the contract. Furthermore, 'Abd Allāh b. 'Umar emphasized that any contract must be stipulated by consent of both parties.<sup>4</sup> Hence, the parties still have their own right of option, in accordance with their own

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1. Naw., p. 130.

2. San., VIII, pp. 52-53.

3. Ibid., p. 53.

4. Ibid.

stipulations or agreements.

There does not appear any comment which was made by the Successors on this subject.

2. Khīyār al-‘ayb (Option to revoke for fault)

The ultimate purpose of this doctrine is a remedy to enable a contracting party to withdraw from any obligation in the contract. This option may be divided into two categories:

a. Khīyār al-ru‘ya (Option at sight)

The purpose of this option is to ensure achieving certainty by giving the purchaser an unqualified option to revoke upon sight and inspection of the transacted goods.<sup>1</sup> This is considered as a unilateral right to rescind. For this option, the Prophet is reported to have said:

"Whoever purchases an article (of goods), and he has not seen it, he has the right of option whenever he sees it."<sup>2</sup>

The Companions

Only ‘Uthmān b. ‘Affān and Ṭalḥa b. ‘Ubayd Allāh, among the Companions, gave the right of option at sight to the purchaser.<sup>3</sup>

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1. Cf. Jaz., II, p. 214; C. Com., p. 65.

2. J. Ma., II, p. 25; Huj., II, pp. 672-73; cf. As1, pt. I, vol. I, p. 123 (1).

3. Haz. Mu., VIII, p. 338.



### The Successors

Regarding khiyār al-ru'ya (Option at sight), al-Sha'bī, al-Ḥasan al-Baṣrī, Ibrāhīm al-Nakha'ī and Muḥammad b. Sīrīn were of the opinion that the purchaser had the right of option whenever he saw the goods.<sup>1</sup>

#### b. Khiyār al-'ayb (Option for defect)

'Ayb (defect) implies a latent fault, flaw or defect, which exists in the goods or services at the time of the contract, and which is material to the purpose of the contract, and substantially impairs the value of the goods or services to the recipient.<sup>2</sup> A purchaser has the right of option on account of defects, of which he has become aware only after taking possession of the commodity which he bought but which existed previously in the commodity. If, on the other hand, the purchaser is aware of the defects when buying the object, then he has no right of option. There is no direct rule attributed to the Prophet on this option.

### The Companions

It seems that this type of option was introduced by the Companions. According to them, it can be

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1. Haz. Mu., VIII, p. 338.

2. C. Com., p. 65.

revoked upon a defect (khiyār al-‘ayb). A purchaser has the right of option on account of defects, of which he has become aware only after taking possession of the commodity. ‘Uthmān b. ‘Affān, the Caliph, decided that anyone who discovered any defect in any movable property, like any cloth,<sup>1</sup> or in immovable property, such as a piece of land,<sup>2</sup> could return them to the vendor. This applies to anyone who has found any defect in any goods which he has bought. In this case, he has the right of revocation of such a contract, by returning the goods and reimbursing the money in toto or not at all. ‘Alī b. Abī Ṭālib considered that the vendor was obliged to return the money to the purchaser, if the purchaser discovered the defect in the goods after the contract and after the goods had already been possessed.<sup>3</sup> However, if the defect is caused by the buyer, after taking possession, he has no right of such a revocation. ‘Abd Allāh b. ‘Umar made a precedent on this point, when he bought a shirt and wore it. He wanted to return it to the vendor, but he discovered the shirt had turned yellowish from his beard, he decided not to return it.<sup>4</sup>

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1. San., VIII, p. 154.

2. Mab., XIII, pp. 70-71.

3. San., VIII, p. 152.

4. Ibid., pp. 154-55.

The Successors

In relation to khiyār al-‘ayb, Shurayh allowed the purchaser to return the defective goods and have the money back.<sup>1</sup> In the case of defect of some sold goods, al-Sha‘bī was of the opinion that the purchaser was allowed to return the defective goods with the good ones or to retain all of them. But ‘Aṭā’ b. Abī Rabāh gave the option to the buyer to return the defective goods and he must retain the perfect ones.<sup>2</sup> Ibrāhīm al-Nakha‘ī did not allow the purchaser to return the goods which had been damaged ~~and~~ to the vendor. But Qatāda allowed the purchaser to return the defective goods, after another defect had occurred with him.<sup>3</sup> The existence of defect with the vendor before the purchase, is to be certified by two witnesses. The purchaser is allowed to return the defective goods, even though he knows such a defect was caused by the vendor before the purchase. This was held by Shurayh.<sup>4</sup> According to Qatāda, there is no contractual obligation (al-uhda) after the transacted goods have been destroyed. But according to Shurayh, the purchaser has the contractual obligation from the vendor if the former can prove the defect or disease has

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1. San., VIII, pp. 154-55.
  2. Ibid., p. 156.
  3. Ibid., p. 157.
  4. Ibid., pp. 158-59.



caused the destruction or death.<sup>1</sup> In any case of exchange of goods, the party who has got a defect in his goods must compensate whatever defect to the other party who has no defect in his goods. This was held by Muḥammad b. Sīrīn.<sup>2</sup>

Bay' al-barā'a (The sale by waiving all claims by way of compensation or without any liability or the resulting absence of obligation)

Concerning any defect in goods, the Companions and the Successors extended their ruling by introducing bay' al-barā'a.

#### The Companions

It was reported that 'Abd Allāh b. 'Umar had sold some goods for eight hundred dirhams on the condition that the goods were without any defect. Later, the buyer discovered some defects in the goods and asked why he had not mentioned the defects to him. Both parties subsequently brought the case before 'Uthmān b. 'Affān, the Caliph. The buyer claimed that 'Abd Allāh b. 'Umar had sold him some goods without mentioning that they had defects. Abd Allāh b. 'Umar replied that he had sold the goods on the basis of al-barā'a (i.e. the buyer had agreed to take the goods in whatever state). 'Uthmān ordered 'Abd Allāh

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1. San., VIII, pp. 163-64.

2. Ibid., p. 165.

b. 'Umar to swear by God that he had sold them without knowledge of the defects. 'Abd Allāh refused to take the oath and accepted the goods back.<sup>1</sup> / In this case, 'Umar b. al-Khaṭṭāb also gave the defective goods to the seller without the oath.<sup>2</sup>

According to al-Shaybānī<sup>3</sup> and al-Ṣan'ānī,<sup>4</sup> bay' al-barā'a was normal practice among the people of Medina and in such cases the seller was exempted from compensation for any damage. However, if the seller knew the defect and concealed it he was liable for damages or compensation.<sup>5</sup> According to al-Shaybānī, Zayd b. Thābit was of the opinion that the seller should be exempted from paying any compensation should he sell goods where there is agreement of both parties on whatever circumstances. Al-Shaybānī agrees with this opinion on the grounds that the purchaser has agreed and is satisfied with the transacted goods and has accepted and possessed them. Therefore, the seller is freed from any liability, whether he has any knowledge about the defect or not.<sup>6</sup>

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1. Muw. Sh., pp. 273-74; Huj., II, pp. 511-12; M. in Um., VIII, p. 182; San., VIII, pp. 162-63.

2. Mud., IV, pp. 351-52.

3. Muw. Sh., p. 274.

4. San., VIII, p. 163.

5. Muw. Sh., p. 274.

6. Muw. Sh., p. 274; cf. Huj., p. 512; Shur., I, p. 31.

‘Uthmān b. ‘Affān ruled that if a man sold an animal he was cleared from any liability if any defects in the animal were not known to him in the first place. But the seller was liable to pay compensation if he knew of the defects. The basis for such a judgement, was that animals in general differ one from another. Health or illness cannot be detected easily, since their natures are changeable.<sup>1</sup>

### The Successors

According to Shurayh, the purchaser was allowed to return the defective goods without any objection, if he had made such a condition, before discovering the defects. However, the purchaser still had a guarantee against specific faults in goods, even if he had not stipulated any condition.<sup>2</sup> Further, the vendor could not avoid liability and had to return the price and take back the goods, whenever the defect was discovered. This was held by Shurayh<sup>3</sup> and ‘Umar b. ‘Abd al-‘Azīz.<sup>4</sup> According to Muḥammad b. Sīrīn and Tāwūs, the defect in any goods, in such cases, had to be specified with absolute accuracy by the purchaser, before any decision or

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1. M. in Um., VIII, p. 182.

2. San., VIII, p. 160.

3. Mud., IV, p. 346; San., VIII, p. 161.

4. Mud., IV, p. 345.



compensation was made.<sup>1</sup> This was also held by Ibrāhīm al-Nakha'ī, Shurayh, 'Aṭā' b. Abī Rabāh and Ibn Jurayj.<sup>2</sup>

3. Khiyār al-ghalaṭ (Option for mistake)

This type of option was only introduced by the Successors. This natural doctrine of a contractual system is based on the "caveat emptor" principle.<sup>3</sup> In this case, Shurayh gave the right of option in a sale for mistake.<sup>4</sup> In this khiyār, Ma'mar b. Rāshid was of the opinion that the purchaser must produce evidence, before his claim can be accepted.<sup>5</sup> But al-Sha'bī rejected any claim for mistake, because he considered that sale is a deception (khud'a).<sup>6</sup> Further, the purchaser has the right of option, if he has been sold different goods but the same type with the ones which he has formerly ordered to buy. This was held by Shurayh.<sup>7</sup>

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1. San., VIII, pp. 161-62.

2. Ibid., p. 162

3. C. Com., p. 69. This principle means that the buyer must ascertain the good quality of goods he buys.

4. San., VIII, p. 311.

5. Ibid.

6. Ibid.

7. Ibid., p. 169.

4. Khīyār al-tadlīs or al-taghrīr (Option for fraud or  
deceit)

The final option to rescind the contract, if the options of defect and sight cannot be put into effect, is the option for fraud. This option exists in cases where the disappointed party can establish that his agreement of a contract was gained by the deceit or wilful misrepresentation of the other party.<sup>1</sup>

It can be revoked for fraud, which causes loss of property. It is forbidden to deceive in business transactions. For instance, it is prohibited to sell an animal put aside for a few days in order to increase the amount of its milk at the moment of sale. Such fraud gives the purchaser the right of cancellation, provided he makes use of it without delay. According to al-Shāfi'ī, the right of the purchaser in these circumstances, can still be exercised three days after the discovery.<sup>2</sup> If the purchaser has already consumed the milk from the animal, he should return it to the vendor together with a ṣā'<sup>3</sup> of dried dates, or of any

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1. C. Com., p. 69.

2. M. in Um., VIII, p. 173.

3. Ṣā' (plural ṣuwā') is a measure for grain "of the value of four mudds (modius), according to the custom of Medina" or it would be approximately five pints. The official capacity of the mudd of Medina (and it was called mudd al-nabī) would be approximately five gills. See Alfred Bel, EI<sup>2</sup>, vol. IV, p. 1.

foodstuff forming the staple diet in that locality.<sup>1</sup>

A ṣā' is the amount due, however much milk has been consumed, as it is intended to prevent any means of disagreement.<sup>2</sup> The Prophet is reported to have said:

"Do not keep camels and sheep unmilked for a long time, for sale, for whoever buys them after that has two recourses (the option) after he milks them. If he is pleased with them, he keeps them and if he is displeased with them, he can return them along with a ṣā' of dried dates."<sup>3</sup>

The Prophet is also reported to have said:

"Whoever buys a sheep unmilked (for a long time), he has the right of option for three days."<sup>4</sup>

The above Traditions indicate the prohibition of any fraud and that the purchaser has the right of option for three days. The option on account of fraud also applies to any kind of fraudulence in business transactions, such as talaqqī al-jalab or talaqqī al-rukbān (to meet the traders on the road for the purpose of getting undue advantage)<sup>5</sup> and al-khilāba (deception in

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1. Qud., IV, p. 151; Zur., III, pp. 339-40.

2. Zur., III, p. 340.

3. Cf. J. Ma., II, p. 25; Muw. Y., p. 569; M. in Um., VIII, p. 180.

4. Asl., pt. I, vol. I, p. 123 (1); cf. Um., III, p. 69; San., VIII, p. 197.

5. Supra chapter II, pp. 79-84.



sale.<sup>1</sup>

The Companions

Abū Hurayra is reported to have said:

"Whosoever purchases any unmilked sheep has the right of option for three days. If he returns it (to the owner) he must do so along with one ṣā' of dried dates."<sup>2</sup>

He also said:

"Whoever buys an unmilked sheep has to return it along with one ṣā' of dried dates."<sup>3</sup>

In another report, he said:

"If anyone buys an unmilked sheep, milks it and is then not satisfied with it, he can return the sheep together with one ṣā' of dried dates."<sup>4</sup>

'Abd Allāh b. Mas'ūd said:

"Beware of keeping animals unmilked for a long time (so as to get a higher price when selling them) (al-muḥaffalāt). Surely it is <sup>a</sup>deception (or cheating) (al-khilāba), and for a Muslim it is not permissible to cheat."<sup>5</sup>

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1. Supra chapter I, pp. 45-47.

2. San., VIII, p. 197.

3. Ibid.

4. Ibid., pp. 197-98.

5. San., VIII, p. 98; Haz. M., IX, p. 67.

He also said:

"Whoever buys an unmilked sheep and returns it has to return it along with one ṣā' of dried dates."<sup>1</sup>

In this case, he did not limit the time of option.

Moreover, 'Abd Allāh b. 'Umar, 'Abd Allāh b. Mas'ūd, Abū Hurayra and Anas b. Mālik all held the opinion that the purchaser had the right of option to return or to keep the unmilked animals in the case where he did not know that the vendor had kept them purposely unmilked at the time of transaction, but realized it later.<sup>2</sup> The above accounts show that the Companions warned the vendors against cheating in any transaction of animals, especially by keeping them unmilked for a long time in order to have greater benefit from the transaction. In this matter, the Companions allowed the purchaser the option of keeping or returning the animals as the Prophet had instructed.

#### The Successors

There does not appear any comment which has been made by the Successors on the option for fraud (khiyār al-tadlīs or al-taghrīr), except on the case of talaqqī al-jalab or talaqī al-rukbān. In this case, Muḥammad b.

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1. San., VIII, p. 98.

2. Qud., IV, p. 150.

Sīrīn gave the right of option to revoke the contract, to the traders on arrival at the market,<sup>1</sup> when they realized and knew the prices of goods and the situation of the market.

To conclude the preceding discussion on al-khiyār, it may be summed up that a contractual commitment becomes legally binding and completely operational only when the whole wide-ranging and elaborate system of al-khiyār is exhausted,<sup>2</sup> or when such a system has been fully utilized or it has not been applied at all.

Haggling and bargaining after a contract has been agreed

There does not seem<sup>to be</sup> any Tradition from the Prophet on this subject. Only the Companions set some precedents on this particular topic. It was reported that 'Umar b. al-Khaṭṭāb disliked haggling for the purpose of lowering a price after a contract had been completed.<sup>3</sup> 'Abd Allāh b. 'Umar was reported to have bought a camel and passed by some people. He told them what price he had bought it for. They advised him to go back and request the camel's owner to bring the price down, assuring him that the seller would lower the price. 'Abd Allāh b. 'Umar refused saying that he had agreed on the price and was

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1. Supra chapter II, pp. 83-84.

2. C. Com., p. 74.

3. San., VIII, p. 60.



satisfied with it.<sup>1</sup> On another occasion, 'Abd Allāh b. 'Umar told his servant that whenever he purchased meat for a dirham, he should not request anything more.<sup>2</sup> These two reports indicate that haggling for a lower price or requesting more goods after the contract has been completed or agreed upon is not encouraged, even though such an act is permitted.

'Alī b. Abī Ṭālib and 'Ammār b. Yāsir, on the other hand, decided that the buyer has the right to receive more goods from the vendor, when he knows that the price of goods transacted is higher than the market price. In this case, the vendor should give them.<sup>3</sup>

### Conclusion

In this chapter, the comprehensive regulations for the conduct of the market in early Islamic law have been demonstrated and analysed. The evidence appears to indicate that the Prophet laid the basic foundations for the management and modes of the market. However, the detailed application of these laws was worked out by later scholars. With regard to al-khiyār (the right of option) and its rules, there was some dispute among scholars as to its application. The Prophet is reported

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1. San., VIII, p. 60-61.

2. Ibid., p. 61.

3. Ibid.

as having decreed the position which was finally accepted generally. However, the opposition of the scholars of Medina indicates that this legal development was by no means universally accepted in the earliest times of Islam.

### CHAPTER III

#### RISK IN SALES AND PERMISSIBLE SALES

This chapter will concentrate on the investigation of the jurisprudential development of two principal aspects of Islamic law of sale, during the time of the Prophet, the Companions and the Successors. Those aspects of the law are:

#### I. AL-Gharar fī al-Bay' (Risk in Sale)

The definition of this doctrine, its practice in pre-Islamic times and the Prophet.

The doctrine of al-gharar, in sales, consists of:

1. Bay' al-ḥaṣāt (A "pebble" sale);
2. Bay' al-mulāmasa (Exchange of commodities by mere touching or a "touch" sale);
3. Bay' al-munābadha (Exchange of commodities by throwing them from one to the other or a "throw" sale);
4. Bay' al-muwāṣafa (Sale by description);
5. Bay' al-sirār (Sale by producing a signet-ring);
6. Bay' al-muzābana (Barter of fresh dates on the tree for dry dates);
7. Bay' al-mukhāḍara (Sale of fruit or crop before it has ripened);
8. Bay' al-muḥāqala (Exchange of seed-produce still in the ear while in growth for the grain of wheat);



9. Bay' al-sinīn or bay' al-mu'āwama (Sale of fruit or harvest years ahead);
10. Bay' al-ḥaml (Sale of gestation or foetus);
11. Bay' al-ḥayawān bi al-laḥm (Sale of animal in exchange for meat);
12. Bay' al-ṣūf 'alā al-ẓahr (Sale of wool on the back of the animal);
13. Bay' al-laban fī ḍurū' al-an'ām (Sale of milk in the udder of animals);
14. 'Asab al-fahl (Sale of service of a male animal required to cover a female animal);
15. Bay' al-samak fī al-mā' (Sale of fish in the water);
16. Darbat al-ghā'is (The trial of a pearl-diver);
17. Bay' al-'abd al-ābiq (Sale of an escaped or runaway slave);
18. Bay' al-maghānim ḥattā tuqsam (Sale of undivided booty);
19. Bay' al-ṣadaqāt ḥattā tuqbaḍ (Sale of ~~sales~~ before they have been accepted);
20. Bay' al-'urbān (Non-returnable deposit or earnest money);
21. Bay'atān fī bay'a or ṣafqatān fī ṣafqa (Two sales in one sale);
22. Shartān fī bay' (Two conditions in a sale);
23. Bay' wa shart (A sale with a condition);
24. Bay' al-thunyā (Sale with an exception);

25. Bay' al-kālī' bi al-kālī' (Exchange of obligation for obligation); and
26. Bay' wa salaf (Selling and lending)

## II. Permissible Sales

### 1. Al-salam (Sale by advance)

Its definition, origin and legality.

The conditions for sale by advance are:

- i. The weight, measure, time and the place of delivery must be specified;
- ii. The price or value of goods must be fixed and the goods must be known;
- iii. The exchange of goods other than advanced goods is not allowed;
- iv. Mortgaging or pledging (al-rahn) and surety (al-kafīl) in al-salam are allowed;
- v. The absence of a condition stipulating that goods must be with the vendor; and
- vi. Al-salam and al-khiyār (The right of option).

### 2. Bay' al-'arāyā (Sale of fresh dates by estimation)

I. AL-Gharar fī al-Bay' (Risk in Sale)

The doctrine of al-gharar

The definition of bay' al-gharar (dangerous, hazardous or risky trading) and its pre-Islamic practice

Literally, gharar implies hazard or risk<sup>1</sup> (khaṭar or mukhāṭara),<sup>2</sup> chance or stake. According to Schacht, Arabic mukhāṭara was attested by medieval Latin as mohatra.<sup>3</sup> In Islamic legal terminology, this is the sale of an article of goods which is not present at hand; or the sale of an article of goods, the consequence ('āqiba) or outcome of which is not yet known; or a sale involving risk or hazard where one does not know whether the commodity will later come to be or otherwise.<sup>4</sup> The term means that such transactions, which are prohibited in Islam, are apparently no different in form from deceiving in Islam, when in reality the nature of the object

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1. Lan., II, p. 2239.

2. See al-Ṣiddīq Muḥammad al-Amīn al-Darīr, al-Gharar wa Athāruh fī al-'Uqūd fī al-Fiqh al-Islāmī, Dirāsa muqārana (Cairo, 1386/1967), p. 27; Franz Rosenthal, Gambling in Islam (Leiden, 1975), p. 139.

3. Intro., p. 78.

4. Cf. Niha, III, p. 335; A'lam, I, p. 358; Zur, III, p. 313.



is not known and therefore risk is involved.<sup>1</sup> Several reasons were given for the prohibition of bay' al-gharar. Some of them were related to fraudulence since such a sale amounts to obtaining the property of others by selling unfulfilled goods and the contract may lead to disputes and disagreements between the parties in the contract,<sup>2</sup> or stipulating an agreement to agree, or an agreement in futuro.<sup>3</sup> While in Islamic law, an agreement must bring about an immediate and certain obligation.<sup>4</sup>

Mālik defines bay' al-gharar explicitly as an aleatory transaction. Bay' al-gharar, according to him, can be defined as the sale of an object which is not present so that the quality being good or bad is not evident to the buyer. These are sales where there is an element of chance.<sup>5</sup> Aleatory sales were common in pre-Islamic times.<sup>6</sup> Eventually, the transaction of al-gharar is reported to have been banned by the Prophet.<sup>7</sup>

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1. Cf. Khar, pp. 49-50; Tahanawī, II, p. 109; Lis., V, pp. 13-14.
  2. Zur., III, p. 313.
  3. C. Com., p. 44.
  4. Ibid.
  5. Muw., Y., pp. 554-55.
  6. Muf., VII, pp. 387-96.
  7. J. Ma., II, p. 19; Muw. Sh., p. 274; Muw. Y., p. 554; M. in Um., VIII, p. 185.

### The Companions

Bay' al-gharar is prohibited because it may cause a vendor to consume or erode the property of others unlawfully, especially if it is supposed that the purchaser cannot take possession of the transacted goods, after the vendor fails to produce them. 'Alī b. Abī Tālib prohibited such a contract.<sup>1</sup> In addition, 'Abd Allāh b. 'Abbās extended the prohibition of bay' al-gharar to bay' al-ghayb (the sale of absent or concealed goods).<sup>2</sup> The latter contract can also be considered as falling within the notion of al-gharar, because it also amounts to risk in business, since the object of sale is uncertain. The purchaser has the right of option to revoke the contract upon sight.<sup>3</sup>

### The Successors

The Successors maintained the Prophet's and the Companions' prohibition of gharar transactions. Three of them were Tāwūs,<sup>4</sup> Mujāhid<sup>5</sup> and Muḥammad b. Sīrīn.<sup>6</sup> But Shurayḥ allowed such transactions, if the vendor

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1. San., VIII, p. 109.
  2. Mud., IV, p. 207.
  3. Supra chapter II, pp. 100-01.
  4. San., VIII, p. 108.
  5. Ibid.
  6. Haz. M., VIII, pp. 399-400.

and purchaser equally knew the nature of the goods.<sup>1</sup>  
This suggests that the Prophet's practice was not yet universally established.

The general principles of avoiding al-gharar

General principles to avoid al-gharar in transactions can be concluded from the Traditions, as reported to have been laid down by the Prophet; a contract must not be doubtful or uncertain as far as the rights and obligations of the parties are concerned. The object of the legal contract, res in commercio, must be precisely determined and terms must be clear and known. This is generally true of measurable (makīl), weighable (mawzūn) or countable (ma'dūd) objects<sup>2</sup> which are subject to the prohibition of al-ribā (usury).<sup>3</sup> Therefore, as a corollary from the Traditions of the Prophet, the following may be inferred:

i. The vendor must be able to deliver the commodity to the purchaser. Any commodity which is non-existent or not deliverable, res extra commercium, are not allowed to be transacted. In this case, the Prophet is reported to have said:

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1. Haz. M., VIII, p. 399.

2. These three important concepts in the law of business transactions correspond to the Roman legal concepts of quae pondere numero mensura constant. See Intro., p. 21.

3. Intro., p. 147.



"Do not sell a thing which is not  
with you."<sup>1</sup>

The sale of non-existent and undeliverable goods was  
common in pre-Islamic times.<sup>2</sup>

### The Companions

Concerning this matter, 'Abd Allāh b. 'Abbās prohibited  
the selling of dates on a palm tree before harvesting  
them.<sup>3</sup> This meant that the transaction was not valid,  
unless the goods were ready to be delivered. Zayd b.  
Thābit and al-Zubayr b. al-'Awwām, on the other hand,  
allowed such transactions.<sup>4</sup> It could be suggested that  
this second opinion was based on the assumption that the  
purchaser knew of the existence of goods and that the  
vendor would be able to deliver them on the agreed terms  
and at the agreed time. In this case, the purchaser  
would be aware of the condition of the goods. In  
addition, 'Abd Allāh b. 'Abbas and 'Abd Allāh b. 'Umar  
invalidated any sale of goods which are not with the  
vendor.<sup>5</sup> This demonstrates that the Companions were  
concerned to interpret and explain the general prohibition

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1. Ah. M., XI, pp. 149-50 (6918); San., VIII, pp. 38  
and 39.

2. Muf., VII, p. 393.

3. San., VIII, p. 41.

4. Ibid.

5. Huj., II, p. 615.

of such sales made by the Prophet and to give their rulings.

### The Successors

They agreed that the vendor must be able to deliver the commodity to the purchaser. Sa'īd b. al-Musayyib, al-Ḥasan al-Baṣrī, Ṭāwūs, Ibrāhīm al-Nakha'ī and Qatāda were all of the view that the vendor was not allowed to sell his goods unless he was able to deliver them.<sup>1</sup> But Sulaymān b. Yasār allowed such transactions. It is possible to argue that Sulaymān allowed transactions where the goods were specified and the purchaser knew of their existence and he was aware that the vendor was able and ready to deliver them, for instance, dates on a palm tree before being harvested.<sup>2</sup>

ii. The commodity must be determined and clearly known (ma'lūm) to the contracting parties. This rule applies to any commodity which can be weighed and measured.<sup>3</sup> A sold commodity is deemed to be sufficiently known to the two parties if it is in their sight and they have inspected it, a commodity not there cannot be sold, unless both parties have previously seen it. The purchaser has the right of option to refuse to buy it,

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1. San., VIII, pp. 42-43.

2. Ibid., p. 40.

3. Intro., p. 147.

after inspection.<sup>1</sup>

The purchaser is, however, not permitted to buy an unknown material. This type of sale is called bay' al-juzāf<sup>2</sup> (the sale of goods which are not known or undetermined as to their quantity), especially foodstuffs; such a sale is considered invalid until the goods have been received by the purchaser. The Prophet is reported to have said:

"It is not permissible for a man to sell foodstuffs at random (or haphazardly) (juzāfā) till the purchaser knows its measurement."<sup>3</sup>

In another Tradition, the Prophet ordered that transacted foodstuff should be measured first, before being sold.<sup>4</sup> The Prophet is also reported to have said:

"Whoever purchases foodstuff by weighing, should not sell it until it has been weighed."<sup>5</sup>

The above Traditions show that the transacted goods must be known by the contracting parties.

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1. Supra chapter II, pp. 100-01.

2. This word was arabicized from Persian "guzāf". See Lan., I, p. 420.

3. Cf. Ah. M., VI, p. 239 (4517) and p. 293 (4639); San., VIII, pp. 131-32.

4. San., VIII, p. 131.

5. Huj., II, p. 697.



The transaction of goods which are not known and of undetermined quantity (bay' al-juzāf) was not uncommon in pre-Islamic times.<sup>1</sup> Further, there was a common practice among the pre-Islamic Arabs to transact non available goods (bay' al-ma'dūm).<sup>2</sup>

### The Companions

This condition, regarding the validity of transactions, was also emphasized by the Companions. 'Abd Allāh b. 'Abbās and 'Abd Allāh b. 'Umar prohibited any transaction in which the parties did not know distinctly the actual state of the goods.<sup>3</sup>

### The Successors

The Successors, two of whom were Ṭawūs<sup>4</sup> and Ibrāhīm al-Nakha'ī,<sup>5</sup> indicated that the contracting parties must be clearly aware of, or know, what the commodity was. Further, Qatāda, al-Sha'bī,<sup>6</sup> Ṭawūs,<sup>7</sup> Muḥammad b. Sīrīn<sup>8</sup> prohibited the sale of foodstuff of undetermined quantity (bay' al-juzāf). Therefore, they held the view, like the

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1. Muf., VII, pp. 390-91 and 399.
  2. Ibid., p. 393.
  3. Huj., II, p. 615.
  4. San., VIII, p. 46.
  5. Ibid., p. 132.
  6. Ibid., p. 40.
  7. Ibid., pp. 131-33.
  8. Ibid., pp. 132-33.

Traditions of the Prophet and the rulings of the Companions, that the goods must be clearly known to the contracting parties. Muḥammad b. Sīrīn ordered that the vendor was obliged to deliver identical goods to those which he had described if he had already sold the non-existing goods. But Shurayḥ allowed the vendor to give any similar goods, as long as the purchaser agreed. Al-Ḥasan al-Baṣrī, however, said that the purchaser had the right of option after he saw the goods in such cases.<sup>1</sup> Ṭāwūs allowed the sale of goods, as long as the quantity of goods, including their weight, was known.<sup>2</sup> Muḥammad b. Sīrīn and Sa'īd b. al-Musayyib approved of purchasing unweighable and unmeasurable goods in cash and then selling them before acceptance or possession.<sup>3</sup> But al-Ḥasan al-Baṣrī disallowed such transactions.<sup>4</sup> Sa'īd b. al-Musayyib, however, prohibited the selling of weighable and measurable goods before they had been accepted or possessed.<sup>5</sup> Further, Muḥammad b. Sīrīn, Sa'īd b. al-Musayyib, Qatāda and Ṭāwūs forbade the selling of certain goods with weighing and others, from the same kind of goods, without weighing.<sup>6</sup> Sa'īd b. al-Musayyib and

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1. San., VIII, pp. 44-45.

2. Ibid., p. 131.

3. Ibid., p. 43.

4. Ibid., p. 44.

5. Ibid.

6. Ibid., pp. 131-32.

Qatāda also disallowed selling certain commodities, especially foodstuffs, without being weighed after having already sold previously by weight.<sup>1</sup> But Ibrāhīm al-Nakha'ī allowed such contracts.<sup>2</sup> In this matter, according to Tāwūs, it was permitted to sell certain goods only after weighing them, whereas others could be sold without being weighed, with the consent of the purchaser, but with the condition that the purchaser would have the right of abrogating the contract.<sup>3</sup> Qatāda allowed the selling of foodstuffs, without measuring them, if the vendor had measured them in front of the purchaser with his consent, before the contract.<sup>4</sup> Further, Muḥammad b. Sīrīn opined that the seller must state the weight of a container in which the goods were put.<sup>5</sup>

The gharar transactions include:

1. Bay' al-ḥaṣāt (A "pebble" sale)

Its origin in pre-Islamic times, its definition and the Prophet

It was reported that this type of transaction had been originally popular in the trading centre of Dūmat

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1. San., VIII, pp. 131-32.
  2. Ibid., p. 132.
  3. Ibid.
  4. Ibid.
  5. Ibid., p. 133.



al-jandal and the market of al-Shihr (Mahra in al-Yaman) during pre-Islamic times, which had been set up on the first day of Rabī' al-Awwal (the third month of the Arabic lunar calendar) continuing until the middle of it. Bay' al-ḥaṣāt, and it was also known as ilqā' al-ḥajar,<sup>1</sup> is effected when the vendor says, "Of these pieces of cloth<sup>2</sup> or these sheep I sell you the one upon which falls this pebble thrown in the air," and the purchaser says, "Yes." Therefore, the transaction is valid on the basis of the existence of an offer and acceptance; similarly the sale of a piece of land is valid to the distance of a stone's throw; or by saying, "I want to buy as many goods as there are stones which I am grasping in my palm,"; or a sale may become irrevocable by throwing a stone; or by stipulating, "I sell you such and such an object, and you will have a right of option until I have thrown this stone."<sup>3</sup> It was reported that the Prophet had forbidden a transaction determined by throwing stones,<sup>4</sup> which involves uncertainty.

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1. Han. M., p. 161 (339); J. Ma., II, p. 17.

2. Muhab, p. 266; Usul, I, pp. 527-28; Muf., VII, pp. 387-88.

3. Usul, I, pp. 527-28; Naw., p. 127; Zad., IV, p. 266; Muf., VII, pp. 387-88.

4. Han. M., p. 161 (339); J. Ma., II, pp. 16-17; Ah. M., XIII, p. 140 (7405); Nasa., VIII, p. 346.

### The Companions and the Successors

It appears that there was no comment made by the Companions. Among the Successors, Ibrāhīm al-Nakha'ī only continued to prohibit bay' al-ḥaṣāt as it involved a certain kind of hazard. During his time, this transaction was also known as a sale of ilqā al-ḥajar (a "throwing of stone").<sup>1</sup>

#### 2. Bay' al-mulāmasa (Exchange of commodities by mere touching or a "touch" sale)

#### Its origin in pre-Islamic times, its definition and the Prophet

Bay' al-mulāmasa originated at the market-town of al-Mushaqqar in Ḥajar.<sup>2</sup> Exchanges of this kind were popularly practised among traders and ordinary Arabs from the middle of Sha'bān (the eighth month of the Arabic lunar calendar) until the end of it, in pre-Islamic times.<sup>3</sup> A "touch" sale is an expression which implies:

1. the sale, i.e. of a piece of cloth already folded, that is bought by merely touching it, and renouncing in advance the right of option accorded by law after seeing it; or

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1. San., VIII, p. 67.

2. This town was situated in Bahrain. Cf. Yaq., IV, p. 541.

3. Muhab, p. 265; Muf., VII, p. 388.

- ii. a sale by merely touching an article without any formal offer and acceptance and without mutual consent; or
- iii. a sale concluded by saying, "When you have touched this cloth I have sold it to you."<sup>1</sup>

Mālik defines bay' al-mulāmasa as the practice where a man can touch a garment but is not allowed to unfold or examine it. Each of them says, "This is for this." This is the reason why bay' al-mulāmasa is forbidden,<sup>2</sup> according to Islamic law. According to Mālik<sup>3</sup> and al-Shāfi'ī,<sup>4</sup> it was reported that the Prophet had forbidden bay' al-mulāmasa. Mālik explained further that selling bundles with a list of their contents was different from the sale of a cloak concealed in a bag or cloth folded up and such things. What made such a sale different was that it was a common practice and what people were familiar with. It was what people had done in the past and was still among the permitted transactions and trading practices of the people. Indeed it was a practice in which they saw no harm because in such a sale of bundles bearing a list of contents but

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- 1. San., VIII, pp. 227-29; cf. Niha., IV, pp. 269-70; Lis., VI, p. 210; cf. Lan., II, p. 2673; Muf., VII, pp. 388-89.
  - 2. Muw. Y., p. 556.
  - 3. Ibid.
  - 4. M. in Um., VIII, p. 186.



where the contents were not undone, no uncertain transaction was intended so that it did not resemble bay' al-mulāmasa (a "touch" sale).<sup>1</sup>

3. Bay' al-munābadha (Exchange of commodities by throwing them from one to the other or a "throw" sale)

Its origin in pre-Islamic times, its definition and the Prophet

The origin of bay' al-munābadha or a "throw" sale was unknown, but it is known only that it was widely practised among the Arabs before the advent of Islam.<sup>2</sup> A "throw" sale was effected simply by two parties mutually exchanging their goods, without any preliminary examination on either side; it was a sale effected by throwing a cloth, an article or a pebble<sup>3</sup> from one to the other to signify the sale,<sup>4</sup> without any examination or mutual consent through the explicit making of an offer and an acceptance; or when, as a sign of conclusion a small pebble is handed over in place of the goods.<sup>5</sup> According to Mālik, bay' al-munābadha is the practice whereby one man throws a garment to another, and the other also throws a garment without either of them making any inspection. Each of them says, "This is for this."

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1. Muw. Y., p. 556.

2. Muf., VII, p. 389.

3. Niha, V, p. 6.

4. San., VIII, p. 227.

5. Lis., III, p. 512; Shaw., V, pp. 150-51.

This practice of bay' al-munābadha is forbidden.<sup>1</sup> It was reported that two types of transaction were forbidden by the Prophet, i.e. bay' al-mulāmasa and bay' al-munābadha.<sup>2</sup> According to al-Naḍr, bay' al-munābadha and ilqā' al-ḥajar or bay' al-ḥaṣāt were the same.<sup>3</sup>

#### The Companions and the Successors

Abū Hurayra continued to prohibit bay' al-mulāmasa and bay' al-munābadha,<sup>4</sup> without proper or adequate inspection, in order to know the goods thoroughly. No comment appears to have been made by the Successors.

#### 4. Bay' al-muwāṣafa (Sale by description)

##### Its definition and pre-Islamic practice

Bay' al-muwāṣafa was a sale of goods which had not been possessed or a sale of goods by describing them, without any inspection and possession, the delivery being made later, after the vendor had bought them.<sup>5</sup> In this mode of bargaining the commodity had not been present. It had also been known as bay' al-murāwāḍa.<sup>6</sup> This was one of the pre-Islamic transactions.<sup>7</sup>

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1. Muw. Y., p. 556.

2. M. in Um., VIII, p. 186; San., VIII, pp. 226-28.

3. Faiq., III, p. 61; Lan., II, p. 2756.

4. San., VIII, p. 228; Zur., III, p. 316.

5. Faiq., III, p. 165; Niha., V, p. 191.

6. Lan., I, p. 1186.

7. Taj., IV, p. 39; Muf., VII, p. 397.

### The Companions

The Companions extended their rulings, although it had not been mentioned by the Prophet, forbidding bay' al-muwāṣafa (sale by description) and they considered it as a gharar transaction. They were 'Abd Allāh b. 'Umar and Jābir b. 'Abd Allāh.<sup>1</sup> They prohibited such transactions, deducing from the Prophet's prohibition of gharar transactions in general and basing their ruling on interpretation and analogy.

### The Successors

According to Sa'īd b. al-Musayyib, the sale by description is a secret agreement (al-muwāṭa'a) made when a man describes to the purchaser goods which are not with him, by deferment of an obligation (naẓira).<sup>2</sup> Sa'īd b. al-Musayyib, Ibrāhīm al-Nakha'ī, al-Ḥasan al-Baṣrī, Ṭāwūs and Qatāda forbade such sales.<sup>3</sup>

It seems that the main reason for forbidding such sales, as far as the Companions and the Successors were concerned, was that the transaction would have to be made before the goods were possessed by the vendor.<sup>4</sup>

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1. San., VIII, p. 43.

2. Ibid., p. 42.

3. Ibid., pp. 42-43.

4. Ibid.



5. Bay' al-sirār (Sale by producing a signet-ring)

Its definition, its origin in pre-Islamic times and the Successors

Bay' al-sirār is effected when one says, "I will put forth my hand and you shall put forth your hand, and if I produce my signet-ring before you, it is a sale for such a price; and if you produce your signet-ring before me, for such a price." If they produce them both together, or do not both produce them, they do the same again.<sup>1</sup> This sale was commonly practised in pre-Islamic times.<sup>2</sup> No comment seems to have been made by the Prophet and the Companions. But among the Successors, only 'Ikrima prohibited this sale, because the parties might suffer loss, remorse or regret,<sup>3</sup> from such a sale. This was also a gharār transaction.

6. Bay' al-muzābana (Barter of fresh dates on the tree for dry dates)

Its definition, its origin in pre-Islamic times and the Prophet

Bay' al-muzābana implies a contract of exchange of harvested dry dates by their calculated and definite measure for fresh dates or other fruit of the same species on the tree.<sup>4</sup> Mālik explained that bay' al-

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1. Lan., I, p. 1337.

2. Muḥab, p. 267; Muf., VIII, p. 394.

3. San., VIII, p. 66.

4. Muw. Sh., pp. 275-76; Muw. Y., pp. 521-22; San., VIII, pp. 96 and 104; C. His., pp. 43-44.

muzābana is buying something whose number, weight and measure is not known.<sup>1</sup> This caused fraud or deceit.<sup>2</sup> Both parties must make it clear that if the fresh dates increase then this increase belongs to the recipient and if it is less that is the seller's responsibility. The same applies to the selling of raisins by measure for grapes.<sup>3</sup> This exchange was also widely known among the Arabs prior to the advent of Islam.<sup>4</sup> It caused several disagreements and disputes.<sup>5</sup> It was reported that the Prophet had forbidden bay' al-muzābana,<sup>6</sup> where goods (i.e. fruits), the weight, size and number of which are not known,<sup>7</sup> are sold in bulk for a definite weight, measure or number of some other goods, i.e. still green dates for a definite measure of ripe dates.<sup>8</sup>

#### The Companions

‘Abd Allāh b. ‘Umar explained that the prohibited muzābana transaction was the bartering of fresh dates

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1. Muw. Y., p. 522; cf. Muw. Sh., p. 276.
  2. Lan., I, p. 1213.
  3. Um., III, p. 63.
  4. Muf., VII, pp. 223 and 390-91.
  5. Ibid., pp. 223 and 391.
  6. ‘Abd Allāh b. ‘Umar, op. cit., p. 68; Muw Sh., pp. 275-76; Muw. Y., p. 521; San., VIII, pp. 95 and 104.
  7. Niha., II, p. 294.
  8. Muw. Y., p. 522; Lis., XIII, p. 195.

for dried dates by measure, and similarly of grapes for raisins.<sup>1</sup> However, Abū Sa'īd al-Khudrī described the forbidden muzābana transaction as exchanging fresh dates still on the trees for dried ones.<sup>2</sup> These two reports show that the Companions continued to disallow the practice of bay' al-muzābana among the Muslim community in the same way as it appears to have been prohibited by the Prophet.

### The Successors

Of the Successors, only Sa'īd b. al-Musayyib is reported to have mentioned the prohibition of bay' al-muzābana.<sup>3</sup>

7. Bay' al-mukhāḍara (Sale of fruit or crop before it has ripened)<sup>4</sup>

### Its origin in pre-Islamic times and the Prophet

As a result of pressures on their economic lives, brought about by difficult circumstances, farmers had to sell their fruits and green vegetables or grain before the benefit was evident. They did so for protection and security from their enemies, such as pests and thieves.<sup>5</sup> This practice was common among the Arabs in pre-Islamic

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1. Muw. Y., p. 521.

2. Ibid.

3. San., VIII, p. 104.

4. See Lis., IV, p. 248.

5. Cf. Muf., VII, p. 222.



times. This type of exchange gave rise to a lot of disputes, quarrels and feuds because of fluctuations in the quantity and quality; losses resulted on these commodities so that claims were made and disputes started.<sup>1</sup> The Prophet is reported to have forbidden bay' al-mukhādara.<sup>2</sup> He forbade selling fruit until it had started to ripen.<sup>3</sup> He prohibited selling grain till it became whitish, or ripe.<sup>4</sup> He forbade this transaction by both buyer and seller.<sup>5</sup> Mālik considered such a sale was a gharar transaction.<sup>6</sup> The Prophet is reported to have stated further:

"Have you not seen if God prevents any fruit (from coming out) for what exchange shall one of you take the property of his brother."<sup>7</sup>

The Prophet is reported to have forbidden selling fruits till their quality was evident<sup>8</sup> or till they were

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1. Cf. Ibid., pp. 222-23 and 391.

2. San., VIII, p. 287.

3. Cf. 'Abd Allāh b. 'Umar, op. cit., p. 68; Han. M., pp. 160-61 (335-37); Um., III, p. 48.

4. Mud., IV, p. 10.

5. Muw. Y., p. 517; Muw. Sh., p. 268.

6. Muw., Y., p. 517.

7. Muw. Y., p. 517; cf. Um., III, p. 48.

8. San., VIII, pp. 62-63.

ready to be eaten.<sup>1</sup> The Prophet is also reported to have said:

"Do not purchase fruits till their quality is evident."

‘Abd Allāh b. ‘Umar asked ‘him,

"When will their quality be evident?"

He replied,

"When they have grown fully (or completely), and become good (to be eaten)."<sup>2</sup>

The Prophet elaborated further that he prohibited selling wheat till it intensified in its calyxes (akmāmih), dates (al-nakhl) until they become blooming ~~and~~ till they become yellowish, grains till they can be cooked, fruits till they can be eaten, and grapes till they blacken.<sup>3</sup>

#### The Companions

Zayd b. Thābit, when in Medina, was reported to have said:

"Do not sell fruit until al-Thurayyā (the Pleiades) were visible (i.e. at the end of May)."<sup>4</sup>

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1. San., VIII, p. 64.

2. Ibid.

3. Ibid., pp. 64-65.

4. Cf. J. Ma., II, pp. 14-15; San., VIII, pp. 62-63.

It was also reported that he had not been used to sell his fruits until the Pleiades were visible.<sup>1</sup> Further, 'Abd Allāh b. 'Abbās held the view that whenever some fruits had become reddish<sup>2</sup> or were ready to be eaten,<sup>3</sup> they were allowed to be sold. 'Umar b. al-Khaṭṭāb and 'Abd Allāh b. Mas'ūd opined that dates cannot be sold until they had become reddish and yellowish.<sup>4</sup> 'Umar b. al-Khaṭṭāb used to sell some fruits which belonged to an orphan and which he had looked after for three years, when their quality was evident.<sup>5</sup> 'Abd Allāh b. 'Umar forbade selling fruit till their quality was evident.<sup>6</sup>

These reports show that the Companions were very wary of dealing with crops and fruits. They did not sell them until their quality was actually evident, to avoid any risk. They also prohibited any mukhāḍara transaction, as did the Prophet.

### The Successors

Muḥammad b. Sīrīn prohibited any sale of cereals, before the quality of grain in the ear was evident, in other words till they became whitish<sup>7</sup> and ovated.<sup>8</sup>

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1. Muw. Y., pp. 517-18; Muw. Sh., p. 268.

2. San., VIII, p. 65.

3. Um., III, p. 48; Tar. II, pp. 149-50.

4. San., VIII, p. 65.

5. Ibid., p. 66.

6. Um., III, p. 48; Tar. II, pp. 149-50.

7. Muw. Y., p. 542; Mud., IV, p. 10.

8. Haz. M., VIII, p. 405.



The sale of unripe dates (al-busr) before they blossom (or become reddish) was also prohibited. He added that some people considered such sales permissible when those fruits or grains were ready to be eaten or cooked.<sup>1</sup> But according to Qatāda certain ripe fruit which was mixed with unripe fruit, could be sold if the ripened fruit was more than the unripe.<sup>2</sup>

'Aṭā' b. Abī Rabāḥ was of the opinion that all edible fruit, such as dates, grapes, pomegranates, peaches (firsik), melons (khirbiz), cucumber and vegetables were not permitted to be sold until they were ready to be eaten.<sup>3</sup> According to Ibrāhīm al-Nakha'ī, edible fruit should be sold when it forms or bears a stone and becomes granulated.<sup>4</sup> But according to 'Aṭā' b. Abī Rabāḥ, any kind or species of plant having a jointed stem, like canes and reeds which include sugar canes, stalk of cereal or grass should be cut, before selling.<sup>5</sup> Further, he prohibited selling fruit, cotton and leaves before their quality was evident. Such fruit and leaves including cotton, henna and edible herbs were allowed to be sold when they were reaped or harvested.<sup>6</sup> Ṭawūs opined that cotton should

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1. San., VIII, p. 63.

2. Ibid., p. 65.

3. Um., III, p. 68.

4. San., VIII, p. 66.

5. Um., III, p. 68.

6. Ibid., p. 49.

be sold in bundles.<sup>1</sup> Mujāhid was of the same opinion,<sup>2</sup> and he disallowed selling cucumber and melon except after being reaped and harvested.<sup>3</sup> In addition, according to al-Shāfi'ī, 'Aṭā' b. Abī Rabāḥ and Ṭāwūs were of the opinion that all edible fruit could be sold when it was ready to be eaten and all inedible fruit or leaves could be sold when its quality was evident.<sup>4</sup> According to al-Ḥasan al-Baṣrī, immature date (al-kufarrā) is allowed to be sold, after being cut, when it becomes reddish or yellowish.<sup>5</sup> Muḥammad b. Sīrīn allowed the selling of walnut (al-jawz), almond (al-lawz) and soft date (al-rānij), if they are dried on the branch of their trees.<sup>6</sup> Further, al-Ḥasan al-Baṣrī, Ibrāhīm al-Nakha'ī, al-Sha'bī, 'Aṭā' b. Abī Rabāḥ and al-Qāsim b. Muḥammad permitted the selling of fresh dates in a single clip,<sup>7</sup> after being reaped or harvested.

8. Bay' al-muhāqala (Exchange of seed-produce still in the ear while in growth for the grain of wheat)<sup>8</sup>

#### Its pre-Islamic origin and the Prophet

This transaction was widely practised in pre-Islamic

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1. Um., III, p. 49.
  2. Haz. M., VIII, p. 407.
  3. Ibid.
  4. Um., III, p. 49.
  5. Muw. Sh., p. 268.
  6. Um., III, p. 52.
  7. Haz. M., VIII, p. 407.
  8. Lan., I, p. 612.

times.<sup>1</sup> The Prophet is reported to have forbidden bay' al-muḥāqala,<sup>2</sup> which was considered to involve certain hazardous elements.

It appears that there was no comment made by the Companions and the Successors on this matter.

9. Bay' al-sinīn or bay' al-mu'āwama (Sale of fruit or harvest years ahead)

Its definition, origin in pre-Islamic times and the Prophet

Bay' al-sinīn was effected by saying: "I sell this commodity (fruit or harvest before the crop has grown on palm trees or others) for a year or more and when the year has ended the term of contract will be terminated between us and I shall give the price and you will give me back my commodity."<sup>3</sup> This type of contract was common in pre-Islamic times.<sup>4</sup> It was reported that the Prophet had prohibited bay' al-sinīn.<sup>5</sup> The reason for its prohibition was the existence of a hazardous element in it.

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1. Muf., VII, p. 223; Haq., pp. 15-16.

2. Muw. Sh., p. 275; Muw. Y., pp. 521-22; San., VIII, p. 95; Mud., IV, p. 544.

3. Cf. Taj., VIII, p. 412; cf. Lan., II, p. 2202.

4. Muf., VII, p. 391.

5. Cf. Huj., IV, p. 177; Tar., II, pp. 145 and 151; cf. Ath., p. 189 (858); Mus. in Um., VIII, p. 497; M. in Um., VIII, p. 178.



The Companions and the Successors

No statement seems to have been made by the Successors concerning bay' al-sinīn. But, 'Abd Allāh b. al-Zubayr, one of the Companions, forbade selling dates years ahead. He called this transaction as bay' al-mu'āwama.<sup>1</sup>

10. Bay' al-ḥaml (Sale of gestation or foetus)

Its pre-Islamic origin, definition, divisions and the Prophet

One common type of sales of foetus, during pre-Islamic times, was bay' ḥabal al-ḥabala.<sup>2</sup> Bay' ḥabal al-ḥabala<sup>3</sup> or bay' nitāj al-nitāj<sup>4</sup> is the sale of an embryo or the sale of a youngling to be brought forth later from the foetus of an animal, that is, what a female animal bears in the womb.<sup>5</sup> The sale of a foetus, during this time, was also known as bay' al-majr,<sup>6</sup> bay' al-ghadawī, bay' al-ghadhī<sup>7</sup> or bay' al-ghadhawī.<sup>8</sup>

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1. Um., III, p. 65; Mus in Um, VIII, p. 498; San., VIII, p. 66.

2. Muf., VII, p. 392.

3. Lis., XI, p. 139.

4. San., VIII, p. 28.

5. Umd., II, p. 262 et seq.; Zad, IV, p. 266; Muf. VII, p. 392

6. San., VIII, p. 80; Niha., IV, pp. 298-99; Muf., VII, p. 392. This contract implies to selling any foetus of camel. See San. VIII, p. 90.

7. Taj., X, p. 263; Muf., VII, p. 392.

8. Lan., II, p. 2236; Muf., VII, p. 392.

It was reported that the people of pre-Islamic days used to sell the meat of camel for slaughter to the extent of ḥabal al-ḥabala. In summary, this contract implies that a she-camel should give birth and then the offspring should grow up and herself become pregnant. Further, during this time, one would pay the price of a she-camel which was not yet born but which would be born from the immediate offspring of an extant she-camel.<sup>1</sup> This also applied to offspring of other animals.<sup>2</sup>

The Prophet is reported to have forbidden bay' al-majr,<sup>3</sup> bay' nitāj al-nitāj,<sup>4</sup> or bay' ḥabal al-ḥabala<sup>5</sup> or selling any foetus of any animal until it was delivered.<sup>6</sup> According to al-Shāfi'ī such a sale was void, because such a contract leads to the transaction of a commodity which, at the time of its delivery, is not known and some times such an animal may not bear a young one at all.<sup>7</sup>

#### The Companions and the Successors

It appears that no new ruling was made by the Companions on this subject. Among the Successors, only

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1. Muw. Sh., p. 275; Muw. Y., p. 546; Muf., VII, pp. 392-93.
  2. Lan., I, p. 505.
  3. San., VIII, p. 90.
  4. Muw. Sh., p. 275; San., VIII, p. 28.
  5. Muw. Sh., p. 275; Muw. Y., p. 546; M. in Um, VIII, p. 186.
  6. San., VIII, p. 76.
  7. M. in Um., VIII, p. 186.

Sa'īd b. al-Musayyib prohibited such contracts. In addition, he elaborated by categorizing this contract into three prohibited sales of foetus. First al-maḍāmīn (foetus), second al-malāqīḥ (sperm) and third ḥabal al-ḥabala (the younglings to be brought forth later from the foetus of an animal).<sup>1</sup>

According to Mālik, that was prohibited because the seller makes use of the price and it is not known whether or not those goods are found to be as the buyer saw them or not.<sup>2</sup> Moreover, al-Shaybānī was of the opinion that transaction of the above three commodities was not permitted because of the existence of the element of gharar in them.<sup>3</sup>

11. Bay' al-ḥayawān bi al-laḥm (Selling animal in exchange for meat)

Its origin in pre-Islamic times and the Prophet

Sa'īd b. al-Musayyib said:

"Part of the gambling of the people of Jāhiliyya (in pre-Islamic times) was bartering live animals for slaughtered meat, for instance one live sheep for two slaughtered sheep."<sup>4</sup>

It was reported that the Prophet had prohibited

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1. Muw. Sh., p. 275; Muw. Y., p. 546; San., VIII, pp. 21-22.

2. Muw. Y., pp. 546-47.

3. Muw. Sh., p. 275.

4. Muw. Sh., p. 276; Muw. Y., p. 547.



bartering live animals for meat.<sup>1</sup> This contract was equated with other similar transactions, such as bay' al-muzābana,<sup>2</sup> where the value and quantity of the merchandise was uncertain (gharar)<sup>3</sup> and it was considered as a kind of gambling or a game of hazard (al-qimār).<sup>4</sup>

### The Companions

It was reported by 'Abd Allāh b. 'Abbās that in the time of Abū Bakr al-Ṣiddīq, the Caliph, a camel was slaughtered, after which a man came with a young she-goat and said: "Give me a part of the (camel's) meat in exchange for this young she-goat." Abū Bakr said: "It is not right (for you) to do that."<sup>5</sup> According to al-Shāfi'ī it was prohibited to sell animals in exchange for meat regardless of their different species. In this case, there is no report giving any opinion from any other Companions contradicting that of Abū Bakr.<sup>6</sup> Therefore, it seems that such sales continued to be banned during the time of the Companions.

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1. Muw. Sh., p. 276; Muw. Y., p. 547; San., VIII, p. 27.
  2. Muw. Sh., p. 276.
  3. A'lām, II, p. 164.
  4. Zur., III, p. 303.
  5. Cf. Um., III, p. 82; M. in Um., VIII, p. 176; Tar., II, p. 145; cf. San., VIII, p. 27.
  6. M. in Um., VIII, p. 176; cf. Mab., XII, p. 181.

The Successors

According to al-Muzanī, al-Qāsim b. Muḥammad, 'Urwa b. al-Zubayr and Abū Bakr b. 'Abd al-Raḥmān<sup>1</sup> and Sa'īd b. al-Musayyib<sup>2</sup> prohibited the sale of animals for meat, whether by cash or on credit. According to Abū al-Zinād, Sa'īd b. al-Musayyib said: "Bartering live animals for dead meat is forbidden." Abū al-Zinād continued, "I said to Sa'īd b. al-Musayyib, "What do you think of a man buying an old camel for ten sheep?" Sa'īd said, "If he buys it to slaughter there is no good in it." Further, Abū al-Zinād added, "All the people that I have seen forbade bartering live animal for meat." He also said, "This used to be written into the letter of appointment of the governors in the time of Abān b. 'Uthmān and Hishām b. Isma'īl.<sup>3</sup> According to al-Shaybānī, this type of transaction was invalid and not permitted, like bay' al-muzābana and bay' al-muḥāqala.<sup>4</sup>

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1. M. in Um., VIII, p. 176.

2. Muw. Sh., p. 276; San., VIII, p. 27.

3. Muw. Sh., p. 276; Muw. Y., p. 547.

4. Muw. Sh., p. 276.

12. Bay' al-ṣ.ūf 'alā al-ẓahr (Sale of wool on the back of the animal)

The Companions

No Tradition suggests that the Prophet prohibited this sale. But 'Abd Allāh b. 'Abbās, one of the Companions, <sup>have forbidden</sup> was the first reported to / such a sale.<sup>1</sup>

The Successors

Sa'id b. Jubayr, one of the Successors, permitted this transaction.<sup>2</sup> In those cases when the contract was effected after the wool had been sheared and weighed, like permission to sell milk in the udder of animals, when it was measured, after milking.

No other comments were made by the Successors on this matter, except what was reported by 'Ikrima<sup>3</sup> and Sulaymān b. Yasār<sup>4</sup> from 'Abd Allāh b. 'Abbās who had prohibited the transaction of wool on the back of a sheep. However, Sufyān al-Thawrī explained that the sale of leather, or even the meat of a cow or bull, while it was standing alive, i.e. before being slaughtered, was also invalid as there was a risky element involved in it.<sup>5</sup>

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1. Asl., pt. I, vol. I, p. 44 (22); Tar., II, p. 147; M. in Um., VIII, p. 186; San., VIII, p. 75.

2. Haz. M., VIII, p. 397.

3. San., VIII, p. 75.

4. Tar., II, p. 147.

5. San., VIII, pp. 109-10.



13. Bay' al-laban fī durū' al-an'ām (Sale of milk in the udder of animals)

The Prophet is reported to have prohibited this transaction,<sup>1</sup> except when the milk was measured,<sup>2</sup> after milking.

The Companions

Concerning bay' al-laban fī durū' al-ghanam (sale of milk in the udder of sheep) or al-an'ām (animals), 'Abd Allāh b. 'Abbās<sup>3</sup> and Abū Hurayra<sup>4</sup> elaborated further, as had been stated by the Prophet, that the sale of milk in the udder was allowed on condition that the milk was measured after milking,<sup>5</sup> because, then, the transaction would not contain any element of uncertainty.

The Successors

The Successors, such as Ṭāwūs, 'Ikrima, Mujāhid and Ibrāhīm al-Nakha'ī continued to prohibit it,<sup>6</sup> as had the Companions. But Ṭāwūs allowed such transactions if the milk was measured.<sup>7</sup> Sa'īd b. Jubayr, however, permitted

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1. Asl. pt. I, vol. I, p. 66 (197).

2. San., VIII, p. 76.

3. Tar., II, p. 147; San., VIII, p. 75.

4. Haz. M., VIII, p. 397.

5. Mus. in Um., VIII, p. 496; M. in Um., VIII, p. 186.

6. San., VIII, p. 75; Haz. M., VIII, p. 397.

7. Haz. M., VIII, p. 397.

the purchase of milk from the mothers of animals.<sup>1</sup> Al-Hasan al-Baṣrī<sup>2</sup> added that if the specified number of days, especially for milking the young animals, were known, for instance the milk from a hired animal (laban al-zi'r), then such a sale was permitted.<sup>3</sup>

14. 'Asab al-fahl (Sale of service of a male animal required to cover a female animal)

Its origin in pre-Islamic times and the Prophet

A common practice in business transactions, among the Arabs in pre-Islamic times, was to sell the service of a male animal which was required to cover female animals.<sup>4</sup> This practice was known as 'asab al-fahl,<sup>5</sup> dirāb al-fahl,<sup>6</sup> dirāb al-jamal,<sup>7</sup> or shabr al-jamal.<sup>8</sup> The Prophet is reported to have prohibited such a sale,<sup>9</sup> or contract, for its uncertainty, whether the vendor is considered to be able to deliver the goods or not.<sup>10</sup>

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1. Haz. M., VIII, p. 397.
  2. Ibid., pp. 397-98.
  3. Qud., IV, p. 231.
  4. Muf., VII, pp. 127-28.
  5. Ah. M., VI, p. 288 (4630); San., VIII, p. 107; Niha., III, p. 234; Lis., I, p. 598; Taj., I, p. 380.
  6. San., VIII, p. 104; Niha., III, pp. 79 and 234; Zad., IV, p. 257.
  7. San., VIII, p. 106; Niha., III, p. 79; Taj., I, p. 346.
  8. San., VIII, pp. 106-07.
  9. M. in Um., VIII, p. 185.
  10. Cf. M. in Um., VIII, pp. 185-86.

This contract constitutes the element of sale and hire or lease.

### The Companions and the Successors

It seems that the Companions did not make any comment on this subject. But among the Successors, Qatāda disallowed the practice of 'asab al-fahl for the one who receives the price or cost of the service but he allowed it for the one who gives such a cost or price.<sup>1</sup> 'Aṭā' b. Abī Rabāḥ and Qatāda elaborated that such a contract was permitted when there was no other person who was willing to give his animal.<sup>2</sup>

### 15. Bay' al-samak fī al-mā' (Sale of fish in the water)

#### Its origin in pre-Islamic times

The sale of fish in the water was commonly practised by the Arabs, in pre-Islamic times.<sup>3</sup>

#### The Companions

There was no evidence to show that the Prophet had forbidden such a contract. But it was reported that the Companions had prohibited such a sale. 'Umar b. al-Khaṭṭāb and 'Abd Allāh b. Mas'ūd prohibited this sale. They forbade the sale of fish in water because *there existed*

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1. San., VIII, p. 107.

2. Haz. M., VIII, pp. 192-93.

3. Muf., VII, p. 394.



element of uncertainty or gharar in it.<sup>1</sup> According to al-Shāfi'ī, the reason why such a contract is invalid is because it is not known whether the vendor is able to deliver the goods, in this case a fish, or otherwise.<sup>2</sup> However, according to al-Shaybānī, the transaction is permitted: first, if the fish is in a shallow container (wi'ā') or well, so that it can be caught without fishing it, then the purchaser has the right of option when he sees it. Secondly, the fish should belong to the vendor and he should be able to catch it whenever he wishes.<sup>3</sup> According to Ibn Ḥazm, such a sale is valid if the vendor has possessed the fish and he is able to catch it without any difficulty. However, if he has not possessed it the transaction is invalid, because he is selling goods which he does not yet own. Such a sale is prohibited even if he can guarantee its delivery. However, there is no dispute over its validity if he keeps the fish in a small pond where he is able to catch it easily.<sup>4</sup> The argument that the sale of fish in water was a gharar transaction was developed by the Companions and it had not been mentioned by the Prophet. Further, according to al-Sarakhsī, the sale of fish in water is not dissimilar to the sale of a bird in the air and so on. Such sales involving a similar degree of hazard are therefore

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1. Khar., p. 50; Ikhtilaf, p. 23.

2. M. in Um., VIII, pp. 185-86.

3. Asl., I, vol. I, pp. 93-94 (21).

4. Haz. M., VIII, p. 400.

prohibited. Such a sale is gharar, because the commodity concerned is not possessed by the vendor physically.<sup>1</sup>

### The Successors

Ibrāhīm al-Nakha'ī extended the prohibition of bay' al-samak fī al-mā', according to what had been ruled by the Companions.<sup>2</sup> But 'Umar b. 'Abd al-'Azīz allowed such transactions.<sup>3</sup> It may be suggested that the latter's opinion was as Ibn Ḥazm elaborated, that such a sale was allowed if the vendor had already possessed the fish and the vendor had a special pond for keeping fish and he was able to catch it, then he was allowed to sell the fish in it.<sup>4</sup> The reason for allowing such a sale in this case was that the vendor was evidently able to deliver the sold fish, which it was also necessary to weigh, measure and transfer.<sup>5</sup> Ibrāhīm al-Nakha'ī extended his ruling from prohibiting selling fish in water to selling game in the jungle or forest (ṣayd al-ājām).<sup>6</sup>

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1. Mab., XIII, p. 12; cf. M. in Um., VIII, p. 185.
  2. Haz. M., VIII, p. 400.
  3. Khar., p. 48; Haz. M., VIII, p. 400.
  4. Haz. M., VIII, p. 400.
  5. Qud., IV, p. 223.
  6. J. Ma., II, p. 20.

16. Darbat al-ghā'is (The trial of a pearl-diver)

Its definition, origin and the Prophet

The transaction of darbat al-ghā'is was effected by saying: "I shall dive into the sea, if I have anything (pearl or precious stone) it will be yours at such and such a price."<sup>1</sup> The vendor (the diver) and the purchaser agree on this condition. This transaction was normally practised by the pre-Islamic Arabs<sup>2</sup> and it is reported to have been banned by the Prophet.<sup>3</sup>

It appears that the Companions and the Successors did not make any statement on this matter. It may be assumed that this type of contract, which had involved gharar elements disappeared by that time.

17. Bay' al-'abd al-ābiq (Sale of an escaped or runaway slave)

Its origin in pre-Islamic times and the Prophet

This type of sale had been commonly practised in pre-Islamic times.<sup>4</sup> The sale or purchase of an escaped slave is reported to have been prohibited by the Prophet.<sup>5</sup>

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1. Niha, III, p. 79; Lis., VII, p. 62.

2. Muf., VII, p. 394.

3. San., VIII, p. 76.

4. Umd., XI, p. 262 et seq; Usul, I, p. 441 et seq;  
Muf., VII, p. 394.

5. San., VIII, p. 211.



The Companions and the Successors

The Companions did not make any new ruling on this subject. Among the Successors, Shurayh decided that a man was allowed to purchase an escaped slave, if he knew the slave's whereabouts. It is understood that Muḥammad b. Sīrīn agreed with Shurayh's view.<sup>1</sup>

According to al-Sha'bī, the prohibition was made because such a sale would amount to gharar, i.e. the purchaser did not know whether the slave would be found later or not.<sup>2</sup> According to 'Ikrima, the prohibition of this sale was also extended to the prohibition of a runaway camel (al-jamal al-shārid),<sup>3</sup> and perhaps others as well.

18. Bay' al-maghānim hattā tuqsam (Sale of undivided  
booty)

The Prophet is reported to have prohibited the sale of undivided booty.<sup>4</sup>

The Companions and the Successors

It seems that no comment was made by the Companions on this subject. The Successors, including Qatāda b. Di'āma held the view that no booty should be sold.

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1. San., VIII, pp. 210-211; Haz. M., VIII, p. 391.

2. San., VIII, p. 211.

3. Haz. M., VIII, p. 391.

4. IH., III, pp. 213 and 14; cf. Han. M., p. 155 (323); Siyar, IV, p. 1213 (2268); Asl, pt. I, vol. I, p. 92 (17); San., VIII, pp. 49-50 and 76.

before being divided. According to Ma'mar b. Rāshid, the reason for this view was that anyone who was entitled to booty did not yet know the amount of his share.<sup>1</sup> This was also held by 'Umar b. 'Abd al-'Azīz. However, according to al-Shaybānī, the public authorities are allowed to sell booty before division. The prohibition of such sales was restricted to cases where an individual having a share in the booty wanted to sell his own share,<sup>2</sup> before being divided.

19. Bay' al-ṣadaqāt hattā tuqbā (Sale of gifts before they have been accepted)

The sale or purchase of gifts before they have been accepted is also reported to have been prohibited by the Prophet.<sup>3</sup>

The Companions and the Successors

It appears that the Companions and the Successors did not give any further views on this matter.

20. Bay' al-'urbān (Non-returnable deposit, handsel, down payment or earnest money)

Its definition, origin in pre-Islamic times and the Prophet

According to Ibn al-Athīr, 'urbān implies i'rāb or

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1. San., VIII, pp. 49-50.

2. Siyar, IV, p. 122.

3. Huj., III, p. 96; San., VIII, p. 76.

declaration regarding the validity of contract of sale, and the goods belong to the purchaser only.<sup>1</sup> This word may be pronounced as 'urbān, 'urbūn and 'arabūn or urbān, urbūn or arabūn.<sup>2</sup> This word corresponds to the Greek word arrha.<sup>3</sup>

Mālik defined bay' al-'urbān, saying:

"That is, in our opinion, but God knows best, that for instance, a man buys an article of goods or rents an animal and then says to the person from whom he bought the goods or leased the animal, 'I will give you a dīnar or a dirham or whatever on the condition that if I actually take the goods or ride what I have rented from you, then what I have given you already goes towards payment of the goods or hire of the animal. If I do not purchase the goods or hire the animal, then what I have given you is yours without liability on your part.'"<sup>4</sup>

Bay' al-'urbān was also known as bay' al-muskān<sup>5</sup> and al-kul'a (earnest money)<sup>6</sup> by the pre-Islamic Arabs, especially in sale, hire (al-ijāra) and deposit (al-wadī'a).<sup>7</sup> This contract is considered as the origin

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1. Zur. III, p. 250; cf. Taj., IX, p. 277 et seq.

2. Lan., II, p. 1994.

3. Intro., p. 9 (n.1).

4. Muw. Y., p. 510.

5. Faiq., II, p. 131; Niha, IV, p. 331; Taj., VII, p. 177.

6. Lan., II, p. 2624.

7. Muf., VII, pp. 401-02.



of al-rahn.<sup>1</sup> The Prophet is reported to have prohibited transactions in which non-returnable or non-refundable deposits were paid<sup>2</sup> as explained above by Mālik.

### The Companions

It was reported of 'Ā'isha, the wife of the Prophet, that one lady<sup>3</sup> had informed her that she had sold Zayd b. Arqam an article of goods at the price of eight hundred dirhams on credit. However, Zayd had not got the money, so she bought the goods back before the time, at the price of six hundred (dirhams) in cash. 'Ā'isha ruled that such a sale had been wrong because of the way Zayd had sold and bought the goods. The lady had asked 'Ā'isha: "... would it be permissible for me to take back my capital?" 'Ā'isha had replied by reciting a verse from the Qur'ān:

"... Those who, after receiving direction from their Lord, desist, shall be pardoned for the past; their case is for God (to judge)....." (Q., 2:275)<sup>4</sup>

According to al-Shāfi'ī, in this sale the problem is that the time between the contract and delivery or possession was not known.<sup>5</sup> According to him, it may have been on

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1. Infra chapter VII, pp. 396-98.
  2. Muw. Y., p. 510; Ah.M., II, pp. 13-15 (6723).
  3. See Huj., II, pp. 747-48 (n.3).
  4. J. Ma., II, p. 9; Ath., p. 186 (843); Huj., II, pp. 747-48; Asl., pt. I, vol. I, p. 206 (45); San., VIII, pp. 184-85.
  5. Um., III, pp. 78-79.

this point that 'Ā'isha disallowed such a contract. But if the above condition had been met (i.e. if the time of the contract had been known) the vendor would have been allowed to sell his goods at whatever price he wished.<sup>1</sup> However, the above two sales indicate that any transaction should be made only after the time of delivery has been specified and the goods have been possessed by the vendor. If two transactions involve different prices, the time of delivery of goods is not known, and in addition the goods have not yet been possessed, then such a contract will amount to usury. To support this opinion, it was reported that 'Abd Allāh b. 'Abbās had said: "Whenever you have sold a piece of silk on credit, do not buy it back (if the time of delivery is not known and it has not been possessed),"<sup>2</sup> However, if the purchaser has possessed the goods, after he has bought them on credit, and he wants to sell the goods to a new prospective buyer, such a sale is permissible. It was reported that 'Abd Allāh b. 'Umar had been asked about a certain man. This man had bought a saddle for cash, then he had wanted to buy another saddle before he had paid for the first (all this took place at one meeting). 'Abd Allāh b. 'Umar had replied: "Perhaps if he (the vendor) sells another saddle to the purchaser for another

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1. M. in Um., VIII, p. 183.

2. San., VIII, p. 187.

sum of money, then it has not been seen as a harmful (transaction).<sup>1</sup> These four sales referred to demonstrated that any deposit had to be returned to the purchaser, if the sale had not been formally contracted, and that the price should remain the same, whether the goods were delivered immediately or later on. Nevertheless, any transaction is permitted as long as it involves different goods and different prices, even at one session.

### The Successors

It is not permitted to buy goods at a rebate or discount (waḍī'a), after they have already been sold, but before they are paid for. Neither is a man allowed to sell back the commodity which he has bought on credit at an unspecified time and nor is he allowed to sell back the commodity on credit at an unspecified time, after he has bought it for cash. This view was held by Ṭāwūs,<sup>2</sup> Masrūq, al-Ḥasan al-Baṣrī, Muḥammad b. Sīrīn and 'Umar b. 'Abd al-'Azīz.<sup>3</sup> According to Mujāhid it was allowed to sell back if the commodity was bought at a higher price.<sup>4</sup> However, al-Sha'bī, Ibrāhīm al-Nakha'ī and Ma'mar b. Rāshid all held the opinion that there was no harm in a man selling back a commodity to the vendor at a higher or lesser price at a set time, after the

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1. San., VIII, p. 187.

2. Ibid., p. 186.

3. Haz. M., IX, p. 106.

4. San., VIII, pp. 187-88.



purchaser had bought it on credit at a specified time or at a future date and at a known price or for cash. This transaction was called bay' al-'īna (sale on credit for payment at a future time).<sup>1</sup> Ibrāhīm al-Nakha'ī added that such a contract was allowed if the goods had changed their nature, from the time of the first contract.<sup>2</sup> Further, Muḥammad b. Sīrīn and Sa'īd b. Jubayr permitted such a sale if it was made immediately.<sup>3</sup>

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1. San., VIII, pp. 186-97. See Lan., II, p. 2214. According to Lane, bay' al-'īna is the selling of a commodity for a certain price to be paid at a certain period, and then buying it for less than that price with ready money. Lan., II, p. 2217. 'Umar b. 'Abd al-'Azīz used to call this contract the sister of usury. See Haz. M., IX, p. 106. Al-Fīrōzābādī regarded al-'īna is a sale by advance and the right of option for property (السلف وخيار المال). See Majd al-Dīn Muḥammad b. Ya'qūb al-Fīrūzābādī, al-Qāmūs al-Muḥīṭ (Beirut, n.d.), p. 255. This sale was popularly practised in pre-Islamic times. See Muf., VII, p. 395. According to Schacht, this contract was a potiori to avoid the prohibition of usury. Intro., p. 153. Cf. Niha., III, pp. 333-34.
  2. San., VIII, p. 188.
  3. Ibid., p. 186.

21. Bay'atān fī bay'a or ṣafqatān fī ṣafqa (Two sales  
in one sale)

Its definition, origin in pre-Islamic times and the  
Prophet

According to Mālik if a man bought goods from another man for either ten dīnars or fifteen dīnārs on credit, one of the two prices was imposed on the buyer. This was not permissible because if he postponed paying the ten, it would be fifteen on credit, and if he paid the ten, he would buy with it what was worth fifteen dīnārs on credit. It was also an object of disapproval for a man to buy goods from someone for either a dīnār in cash or for a described sheep on credit because one of the two prices was imposed on him. This was not right.<sup>1</sup> This contract was commonly practised by the Arab traders in pre-Islamic times.<sup>2</sup> The Prophet is reported to have forbidden two sales in one sale,<sup>3</sup> and this was such a sale. Sufyān al-Thawrī explained this sale by saying: "I sell you this article for ten dīnārs, if you give me cash you will have it for a few dirhams."<sup>4</sup>

The Companions

'Abd Allāh b. Mas'ūd prohibited two deals in one.

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1. Muw. Y., p. 553; cf. Niha, I, p. 173.

2. Muf., VII, p. 366.

3. Muw. Y., p. 553; Ah. M., VII, p. 240 (5390) and XI, p. 150 (6918).

4. San., VIII, p. 139.

He considered it as usury.<sup>1</sup> He explained further that to say that a deal on credit is at one price whereas a cash sale is at another price is not permissible.<sup>2</sup> 'Umar b. al-Khaṭṭāb,<sup>3</sup> 'Abd Allāh b. 'Abbās,<sup>4</sup> 'Abd Allāh b. 'Umar,<sup>5</sup> Zayd b. Thābit<sup>6</sup> and Abū Sa'īd al-Khudrī<sup>7</sup> forbade such sales as well. According to Zayd b. Aslam such a pre-Islamic sale was regarded as usury.<sup>8</sup> However, in this case, 'Abd Allāh b. 'Umar allowed the sale of goods until the purchaser becomes solvent to pay it back, without specifying the term of such repayment.<sup>9</sup>

### The Successors

On principle, Muḥammad b. Sīrīn considered that two sales in one sale was valid if the seller asked for the cheapest sale, otherwise it would be usury.<sup>10</sup> Masrūq,<sup>11</sup> Sulaymān b. Yasār,<sup>12</sup> Ibrāhīm al-Nakha'ī<sup>13</sup> and al-Qāsim b. Muḥammad<sup>14</sup> prohibited such sales. But Ṭāwūs and

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1. San., VIII, p. 139.
  2. Ibid., p. 138.
  3. Muw. Sh., p. 270; Mud., IV, p. 130.
  4. Mud., IV, p. 130.
  5. Muw. Sh., p. 270; Muw. Y., p. 553 and cf. p. 561.
  6. Muw. Sh., p. 271; Muw. Y., p. 560.
  7. Mud., IV, p. 130.
  8. Muw. Y., p. 561.
  9. San., VIII, p. 138.
  10. Ibid., p. 137.
  11. Ibid., p. 139.
  12. Mud., IV, p. 130.
  13. Ath., p. 183 (831).
  14. Muw. Y., p. 553; Mud., IV, p. 192.



Sa'id b. al-Musayyib saw no harm in it provided each sale was agreed on separately<sup>1</sup> and was bought before separation. Further, Tawūs held that such a sale was valid if the parties agreed on the lower of the two prices and the longer of the two agreed times. According to Ma'mar b. Rāshid such a sale was valid if the goods had been consumed.<sup>2</sup> Al-Thawrī added that the purchaser had the option of two sales as long as the sale had not been concluded and provided the vendor clarified whether it was a cash sale, what the price was and whether credit was involved. However, if the purchaser agreed to the terms made by the vendor such a sale was prohibited, because it was two sales in one sale. On realizing that after the contract, if the goods still exist the purchaser should return them and if they had been consumed, the purchaser should pay the lower of the two prices, in accordance with the longer agreed time.<sup>3</sup> In addition, al-Thawrī held that, if the vendor presented the remainder of the price as a gift or donation, he should specify what part of the price was donation (al-naḥla).<sup>4</sup>

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1. San., VIII, pp. 136-37.

2. Ibid., pp. 137-38.

3. Ibid., p. 138.

4. Ibid., p. 139.

22. Shartān fī bay' (Two conditions in a sale)

Its definition, origin in pre-Islamic times and the Prophet

Such a sale is effected when a vendor says: "I sell this cloth for one dīnār in cash and two dīnārs on credit."<sup>1</sup> It may be presumed that the vendor made two conditions not only on the price but on other aspects as well. Otherwise it was called bay'atān fī bay'a. This contract was reported to have been banned by the Prophet.<sup>2</sup> Since the Prophet ordered his representative. 'Attāb b. Asīd to prohibit the Meccans to continue such a practice, it appeared that this type of contract had been widely practised by pre-Islamic Meccans.<sup>3</sup>

No comment seems to have been made by the Companions and the Successors on this subject.

23. Bay' wa shart (A sale with a condition)

The Prophet is reported to have not permitted the stipulation of a condition in a sale,<sup>4</sup> which gave extra advantage to the vendor or to the purchaser.<sup>5</sup> The

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1. Taj., V, p. 166; Muf., VII, p. 390; Lan. II, p. 1533.

2. Waq., III, p. 959; San., VIII, pp. 39 and 41; Han. M., p. 162 (342).

3. Waq., III, p. 959; J. Ma., II, pp. 11-12; San. VIII, pp. 39 and 41.

4. J. Ma., II, p. 22.

5. Haz. M., VIII, p. 415.

Prophet emphasized that:

"....Whoever imposes any condition (in business transactions or others) which is not in God's book (law), then that condition is invalid...."<sup>1</sup>

### The Companions

'Umar b. al-Khaṭṭāb, 'Abd Allāh b. Mas'ūd, 'A'isha and 'Abd Allāh b. 'Umar all forbade selling any goods with a condition which gave further unjustifiable benefit to the vendor or to the purchaser. They considered such a sale invalid.<sup>2</sup> Therefore, any condition should not be included in a contract. Further, Mālik<sup>3</sup> and al-Shaybānī<sup>4</sup> considered such a sale invalid.

### The Successors

Any sale which included one condition, such condition, or sale, was invalid. This was held by Ibrāhīm al-Nakha'ī, 'Ikrima<sup>5</sup> and 'Aṭā' b. Abī Rabāḥ,<sup>6</sup> while Shurayḥ, al-Sha'bī and 'Amr b. Dīnār<sup>7</sup> allowed such sale. It may be concluded that such permission was given as long as both parties in the contract agreed to the prior condition.<sup>8</sup>

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1. Muw. Y., pp. 668-69; Haz. M., VIII, p. 417.
  2. San., VIII, p. 56; Muw. Sh., pp. 279-80.
  3. Muw. Y., p. 516.
  4. Muw. Sh., p. 280.
  5. San., VIII, pp. 56-58.
  6. Haz., VIII, p. 413.
  7. San., VIII, pp. 57-58.
  8. Haz. M., VIII, p. 412.



24. Bay' al-thunyā (Sale with an exception)

The Prophet, the definition of bay' al-thunyā and its pre-Islamic practice

The Prophet was reported to have forbidden any transaction with an exception (of other goods of the same kind), until the purchaser knew the (quantity and quality of) goods.<sup>1</sup> This includes <sup>cases</sup> where an exception is made of goods sold without measuring or weighing or numbering.<sup>2</sup> The reason for such prohibition was because of the lack of knowledge of the goods.<sup>3</sup> If the exempted goods are unknown, then the transaction is unlawful<sup>4</sup> and invalid, since it involves uncertainty or gharar.<sup>5</sup> In pre-Islamic times, the seller of the camel used to except the head and legs or extremities of a camel, after it was slaughtered, whenever he sold it for a certain price.<sup>6</sup>

The Companions

'Abd Allāh b. 'Umar was reported to have said: "I will not sell these dates nor those, with any exception."<sup>7</sup> It was also reported that when he was selling fruit he said: "For four thousand (dirham) for all the fruit except for

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1. Haz. M., VIII, p. 433.

2. Lan., I, p. 358.

3. Taha., IV, p. 29 (n.5.)

4. Lan., I, p. 358.

5. Sab., III, pp. 77-78.

6. Lan., I, p. 358.

7. Haz. M., VIII, p. 433.

that of the young people who were picking it."<sup>1</sup> According to Ibn Ḥazm the latter report shows that 'Abd Allāh b. 'Umar was the first to oppose sales with an exception. If some portion of the young people's fruit had been excluded from the sale, then the transaction could have been invalid, because the quantity and quality of the fruit would have been unknown.<sup>2</sup> To support this argument, in another report he saw no harm in selling fruits with exception if their quantity was known.<sup>3</sup> We can therefore conclude that the first report belongs to the same category as the second. The transaction with an exception is invalid unless the quality of fruit, or other goods, is known and their quantity is measured or weighed. Therefore, it appears that of all the Companions 'Abd Allāh b. 'Umar comes closest to the instruction of the Prophet in his Tradition.

#### The Successors

The majority of Successors, including Qatāda, Sālim b. 'Abd Allāh,<sup>4</sup> al-Qāsim b. Muḥammad,<sup>5</sup> Sa'īd b.

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1. San., VIII, p. 261.

2. Haz. M., VIII, p. 434.

3. Ibid.

4. San., VIII, pp. 261-62.

5. Muw. Sh., p. 269; Muw. Y., p. 519.

al-Musayyib<sup>1</sup> and Muḥammad b. 'Amr b. Ḥazm<sup>2</sup> permitted the sale of dates, with an exception, where their quantity was known (i.e. a specified weighed quantity of dates). Al-Qāsim b. Muḥammad argued in support of such sales, saying that if such sales had been disallowed, certainly 'Abd Allāh b. 'Umar would have prohibited them. But such sales were agreeable and acceptable,<sup>3</sup> if the quantity and the quality of goods were known. This exception might also be made for the sale of other goods. This opinion was held by Sa'īd b. al-Musayyib and Ibrāhīm al-Nakha'ī.<sup>4</sup> But the latter allowed the exception provided it involved not more than half of the fruit. In addition, Muḥammad b. Sīrīn allowed the purchaser, in cases of the sale of fruit, to make an exception of half, one third or one fourth of the total amount of transacted fruit.<sup>5</sup> However, al-Shaybānī accepted the exception to the amount of one fourth, one fifth or one sixth.<sup>6</sup>

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1. Haz. M., VIII, p. 433.

2. Muw. Sh., p. 268; Muw. Y., p. 519.

3. San., VIII, p. 262; Haz. M., VIII, p. 433.

4. Haz. M., VIII, p. 433.

5. Ibid., pp. 433-34.

6. Muw. Sh., p. 269.



25. Bay' al-kāli' bi al-kāli' (An exchange of obligation for obligation)

Its definition, origin in pre-Islamic times and the Prophet

The impermissibility of a delay in the exchange of commodities which are subject to the rules concerning usury finds its logical complement in the general prohibition of bay' al-kāli' bi al-kāli'<sup>1</sup> or an exchange of credit for credit (al-nasī'a bi al-nasī'a).<sup>2</sup> This contract was normally practised by pre-Islamic Arabs.<sup>3</sup> This contract was also termed as bay' al-dayn bi al-dayn<sup>4</sup> and bay' al-ajal bi al-ajal.<sup>5</sup>

According to Mālik, this sale is when someone enters into the transaction which is forbidden in terms of delay for delay. It involves selling a debt against one man for a debt against another man.<sup>6</sup> What is prohibited by this contract is the purchase by a man of a commodity on credit for a fixed period, and, when the period of payment comes and he finds he is not able to pay the debt, he says, "Sell it to me on credit for a further period, for something additional." Whereupon he sells, thus, it to him.<sup>7</sup> The Prophet is reported to

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1. Intro., p. 146.

2. Lis., I, p. 147.

3. Muf., VII, p. 402.

4. Um., III, pp. 8-9; San., VIII, p. 90.

5. San., VIII, p. 89.

6. Muw. Y., p. 550; cf. Niha., IV, p. 194.

7. Lan., II, p. 2624.

have prohibited such a sale.<sup>1</sup>

### The Companions

It was reported that 'Abd Allāh b. 'Umar had been asked about a man who had bought on credit some foodstuff already bought on credit. 'Abd Allāh disallowed such a contract.<sup>2</sup> 'Abd Allāh b. 'Abbās also forbade such a sale, even if the transaction was made between a half credit against a whole credit.<sup>3</sup>

### The Successors

'Aṭā' b. Abī Rabāḥ,<sup>4</sup> al-Ḥakam b. 'Utayba and al-Thawrī<sup>5</sup> still prohibited any exchange of obligation for obligation. But 'Aṭā' elaborated that there was no harm in exchanging two goods if one of the goods had been credited and the other had been completely or fully paid one (nājiza).<sup>6</sup>

## 26. Bay' wa salaf (Selling and lending)

### Its definition, the Prophet and its pre-Islamic practice

Mālik defined the contract of selling and lending,

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1. San., VIII, p. 90.
  2. Asl., pt. I, vol. I, pp. 12-13 (44); San., VIII, p.90.
  3. Mab., XII, p. 143.
  4. Um., III, p. 99; San., VIII, p. 89.
  5. San., VIII, pp. 89-90.
  6. Um., III, p. 99.

saying:

"The explanation of what that meant is that one man says to another, 'I will take your goods for such and such if you lend me such and such.' If they agree to a transaction in this manner, it is not permitted. If the one who stipulates the loan abandons his stipulation, then the sale is permitted."<sup>1</sup>

The Prophet is reported to have prohibited selling and lending,<sup>2</sup> as the above explained contract. In another Tradition, the Prophet appointed 'Attāb b. Asīd as his representative to the people of Mecca and he is reported to have said:

"Prevent (or stop) them (the people of Mecca) from making.... a selling and lending (contract) (concurrently)...."<sup>3</sup>

The Tradition suggests that a contract of selling and lending was extensively practised by the Arabs in pre-Islamic times in Mecca and the Prophet prohibited it.

It appears that neither the Companions nor the Successors made any comment on this particular matter.

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1. Muw. Y., pp. 548-49.

2. Waq., III, p. 959; Muw. Y., p. 548; M. in Um., VIII, p. 187; San., VIII, pp. 39 and 41.

3. Han. M., p. 162 (342); J. Ma., II, pp. 11-12.



## II. Permissible Sales

The following transactions were legitimate sales, which were considered as being exceptions from the gharar transactions. They were as follows:

1. Al-salam (Sale by advance); and
2. Bay' al-'arāyā (A contract of barter in dates or sale of fresh dates by estimation).

The analysis of these subjects will be illustrated in the following discussions:

1. Al-salam (Sale by advance)

### The definition of al-salam

Al-salam is the sale of goods in which the price is paid immediately for goods which are to be delivered later, but which are specified in the contract,<sup>1</sup> or a contract for delivery with pre-payment.<sup>2</sup> Such a sale is

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1. Cf. Tāj., VIII, p. 337; cf. Lan., I, p. 1413.
  2. Intro., p. 106. According to Fitzgerald, in al-salam the price must be paid in cash in the contract. A contract must be made for definite delivery at a specified future date for a res fungibilis (the goods which are sold by quantity and quality, e.g. corn). See Seymour Vesey-Fitzgerald, Muḥammadan Law - An Abridgement According to its Various Schools (London, 1931), p. 185.

also called al-salaf,<sup>1</sup> al-taslīf<sup>2</sup> or al-sulfa.<sup>3</sup> In other words, al-salam means that the purchaser pays the seller in cash and fixes a certain time for the finalization of the transaction, e.g. in exchange for fifteen dīnārs a certain amount of wheat is promised. For example, he pays fifteen dīnārs in cash and the time for delivery is fixed at one month.<sup>4</sup>

The origin, pre-Islamic practice of al-salam and the Prophet

A Tradition was reported by 'Abd Allāh b. 'Abbās that the Prophet emigrated to Medina and the people used to pay in advance the price of fruits (or dates) to be

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1. Um., III, p. 89. According to Ibn al-Athīr, in al-mu'āmalāt (business transactions) al-salaf denotes two meanings. First, it applies to al-qarḍ (loan) which draws no benefit to the lender, except the reward from God and the gratitude from the borrower, to return the loan as much as what he has borrowed. The Arabs considered al-qarḍ as al-salaf in this case. Secondly, it applies to a sale by advance or al-salam. See Niha., II, p. 390; cf. Lis., IX, pp. 158-59. According to al-'Aynī, the word of al-salaf was originated from 'Iraq and al-salam was from al-Hijāz. 'Umd., XII, p. 61; cf. Tahanawī, IV, p. 41.
  2. Mud., IV, p. 2; San., VIII, p. 8; Haz. M., IX, p. 105.
  3. Muw. Y., p. 537.
  4. Lan., I, pp. 1408 and 1414.

delivered within one, two and three years.<sup>1</sup> This Tradition indicates the precedent for this type of sale of foodstuffs and it shows that the Arabs in pre-Islamic times, especially in Medina, had been practising this type of contract.<sup>2</sup> But such a sale had been carried out without specifying the measure, weight and the date of delivery, which was against the principle of Islamic law, because the Prophet was reported to have said:

"Whoever pays money in advance (for fruit)<sup>3</sup> (to be delivered later) should pay it for a known specified measure and weight (of dates or fruits) and time (to be delivered)."<sup>4</sup>

#### The legitimacy of al-salam

i. 'Abd Allāh b. 'Abbās<sup>5</sup> said:

"I witness that the sale by advance which is guaranteed to a (certain) period was permitted by God, in His Book, and allowed it. Then, he ('Abd Allāh b. 'Abbās) recited the verse:

'O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, put them in writing.'"<sup>6</sup>

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1. Um., III, p. 94; / M. in Um., VIII, p. 188; cf. San., VIII, p. 4.
  2. Muf., VII, p. 435.
  3. Cf. San., VIII, p. 4.
  4. Um., III, p. 94; M. in Um., VIII, p. 188.
  5. Um., III, pp. 93-94.
  6. Q., 2:282.



ii. The Prophet is reported to have said:

"Whoever pays money in advance for fruit that is a (practice of) usury, except if he pays it for a known specified weight and time of delivery."<sup>1</sup>

iii. According to al-Muzanī, the Prophet sanctioned salam transaction of animals, because he used to do it.<sup>2</sup>

It may be argued that the Prophet prohibited anyone to sell any goods which are not with him, as he is reported to have told Ḥakīm b. Hizām:

"Do not sell anything which is not with you."<sup>3</sup>

According to Abū Ḥanīfa, al-Thawrī and al-Awza'ī such advanced goods should be present during the time of the contract.<sup>4</sup> Al-Shāfi'ī who made a systematic argument in reply to this question said that the above Tradition implies that the seller is not permitted to make any transaction if he is not sure of being able to deliver the goods, because such a sale is gharar and hazardous.<sup>5</sup> Nevertheless, if the sale is known and guaranteed with certainty and it is sure that the vendor

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1. San., VIII, p. 4.

2. M. in Um., VIII, p. 189.

3. Um., III, p. 94; Ah. M., XI, pp. 149-50 (6918); San., VIII, pp. 38 and 39.

4. Ja'far Muḥammad b. al-Ḥasan al-Ṭūsī, Kitāb al-Ikhtilāf, II (Qum, n.d.), p. 86.

5. M. in Um., VIII, pp. 188-89.

will be able to fulfil the sale in time then such a sale is valid as a salam transaction,<sup>1</sup> which is permitted in accordance with Islamic law. In other words, the goods, in the salam transaction, should be of a nature to permit their delivery at the term stipulated. Al-Muzanī added that the sale of an undetermined quantity of goods (bay' al-juzāf) in salam transactions, is not allowed<sup>2</sup> because it amounts likewise to uncertainty in sale.

Islamic law, however, accepted the legality of commercial transactions which were speculative in nature. Such a transaction was sale by advance or sale by future delivery (al-salam). This contract was legalized because of the incapability of the owner, or of someone acting on his part, to deliver the goods immediately. The specification of the time of delivery, of the weight and measure of goods, established as evidence for existence of goods. This was a special dispensation or a concession (rukhsa) for the owner of the goods to deliver them at such a time.<sup>3</sup>

### The Companions

Concerning al-salam, 'Abd Allāh b. 'Umar said:

"There is no harm if a person enters  
into a transaction with another man

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1. Um., III, p. 95.

2. M. in Um., VIII, p. 189.

3. Mab., XII, p. 123.

in foodstuff at a stipulated period, on known prices, provided it is not a matter of concern, whether the seller has the foodstuff or not, and provided it is not a crop the quality of which is not known, also, provided the sale is not concerned with fruits, the quality of which is not known."<sup>1</sup>

‘Abd Allāh also said:

"I am happy if any man takes a dīnār from me and uses it to buy me foodstuff from al-Shām (Syria)."<sup>2</sup>

Further, ‘Abd Allāh b. Mas‘ūd forbade making a salam contract of an animal.<sup>3</sup> But ‘Abd Allāh b. ‘Umar allowed such a contract if it was stipulated that the repayment of it would be made at a specified time.<sup>4</sup> The above reports showed that the Companions continued to permit the practice of sale by advance.

### The Successors

Shurayh<sup>5</sup> and Sa‘īd b. Jubayr<sup>6</sup> forbade salam contract of animal. But Sa‘īd b. al-Musayyib and al-Ḥasan al-Baṣrī allowed such a contract if it stated that repayment

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1. Muw. Sh., p. 273; Muw. Y., p. 537.

2. San., VIII, p. 5.

3. Ibid., pp. 23-24 and 26.

4. Ibid., p. 25.

5. Ibid., p. 24.

6. Ibid., p. 26.



of it would be made at a specified time<sup>1</sup> of delivery.

The conditions for al-salam

- a. Al-salam for a known specified weight, measure and time

There must be precise specification of the amount, either by measure of capacity, by weight, by number, or by measure of length and a precise specification of the time of delivery. The Prophet is reported to have said:

"Whoever pays in (a contract of) advance (for goods) (to be delivered later) should pay (it) for a known specified measure, weight and time of delivery (of those goods)."<sup>2</sup>

In addition to such ruling, the Prophet forbade selling dates by advance till they begin to ripen.<sup>3</sup>

Abū Hanīfa and al-Shaybānī agree that the weight or measure and time must be known in salam transactions.<sup>4</sup> Al-Shāfi'ī emphasizes that the time must be fixed and payment of the price advanced must take place on the spot and before separation.<sup>5</sup>

The Companions

'Abd Allāh b. 'Umar opined by extending a new

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1. San., VIII, p. 25.

2. Um., III, p. 94; M. in Um., VIII, p. 188.

3. J. Ma., II, p. 10.

4. Muw. Sh., p. 273.

5. M. in Um., VIII, p. 189.

ruling from the Prophet's rulings, that no harm was incurred by anyone who bought specified goods in advance, with the known silver or at a known price,<sup>1</sup> at a specified time and with a known measurement.<sup>2</sup> He and 'Abd Allāh b. 'Abbās saw no harm in paying silver for silver for cash in advance.<sup>3</sup> 'Abd Allāh b. 'Umar said that there was no harm in a man making an advance to another man for food of a set description and price with a set date of delivery whether the food was with the owner or not,<sup>4</sup> as long as it was not in the form of crops or fruit which had not begun to ripen.<sup>5</sup> 'Abd Allāh b. 'Abbās was of the same opinion.<sup>6</sup> But according to the latter, the purchaser must take possession of the goods, before selling them to others.<sup>7</sup> In addition, the authority had the power to force the purchaser, if he was reluctant, to accept the goods before the set time arrived. This was the opinion of 'Umar b. al-Khaṭṭāb.<sup>8</sup>

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1. Asl, pt. I, vol. I, p. 13 (45).
  2. Muw. Sh., p. 273; Huj., II, p. 619; San., VIII, p. 5.
  3. Um., III, p. 94; Tar., II, p. 162.
  4. Um., III, p. 94; Tar., II, p. 147.
  5. Muw. Sh., p. 273; Muw. Y., p. 537; Mud., IV, p. 9.
  6. Huj., II, p. 618; Um., III, pp. 96-97; Tar., II, p. 147; San., VIII, p. 6.
  7. Muw. Y., p. 549.
  8. Um., III, p. 140.

### The Successors

The Successors, like the Companions, continued to allow the practice of salam or salaf transactions. However, they extended and stipulated certain conditions before such transactions were allowed to be carried out. Those conditions were made for the prices and the goods:

- i. The price or value of goods must be fixed and the goods must be known

Muḥammad b. Sīrīn<sup>1</sup> and 'Aṭā' b. Abī Rabāḥ<sup>2</sup> disallowed salam transaction where the price or value of goods was not fixed. According to al-Sha'bī, in salam transaction, the price and the goods must be known.<sup>3</sup> This implies that the uncertainty or fluctuation of price of goods may cause injustice to a vendor, who is desperate to obtain capital for improvement of his business. If he could not rely on a fixed price he would fall further into debt. Ibrāhīm al-Nakha'ī added that the purchaser is not allowed to make his debt with the vendor as the price of advanced goods till the latter has possessed them.<sup>4</sup> According to Abū Ḥanīfa, it amounts to an exchange of obligation for obligation, which is forbidden.<sup>5</sup> According to Qatāda, Ṭāwūs,

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1. San., VIII, p. 7.
  2. Um., III, p. 97.
  3. Huj., II, p. 616.
  4. J. Ma., II, p. 4.
  5. Ibid.



Ibrāhīm al-Nakha'ī<sup>1</sup> and al-Thawrī such a regulation was included in the case of agricultural produce, because of their fluctuating nature.<sup>2</sup> This emphasis, by the Successors, was really justified, since the equity in salam contracts depended on the very existence of the goods, otherwise such transactions were invalid.

ii. Salam for a known specified weight, measure and time

Of paramount importance in salam or salaf transactions is the condition that weight, measure of goods and the time of delivery must be specified and known. This view was held by Ibrāhīm al-Nakha'ī,<sup>3</sup> 'Ikrima, Sa'īd b. al-Musayyib, al-Ḥasan al-Baṣrī and al-Thawrī.<sup>4</sup> Lack of knowledge of the weight, measure of goods and time of delivery in a salam transaction would render it invalid. According to al-Ḥasan al-Baṣrī, the vendor was allowed to sell the same sold goods by advance to others, after the time of delivery arrives, if they had not been collected. But he is not allowed to use the capital from the price of the advanced goods which have been sold, to buy other goods. Nor is he allowed to buy the same advanced goods for more than the amount at which they have first been sold until the delivery is

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1. J. Ma., II, p. 4 and 10.

2. San., VIII, pp. 8-9.

3. J. Ma., II, p. 4; Ath., p. 188 (854).

4. San., VIII, pp. 6-7.

made to the first buyer. However, Muḥammad b. Sīrīn allowed the vendor to make any new contract by advance, before the delivery, if both parties have agreed to it.<sup>1</sup> According to Ibrāhīm al-Nakha'ī, there is no harm in making a salam contract by exchanging measured goods for weighed goods and weighed goods for measured goods only, but not between measured goods for measured goods and weighed goods for weighed goods.<sup>2</sup>

iii. The known or specified place of delivery

According to Muḥammad b. Sīrīn and al-Thawrī, one of the pre-eminent conditions in a sale by advance was the/ specification of place where the goods would be discharged or executed. Without such specification, notwithstanding certification of the time of delivery, the contract would be rejected and rendered invalid and the money could be reclaimed.<sup>3</sup> However, Muḥammad b. Sīrīn<sup>4</sup> and Sa'īd b. al-Musayyib<sup>5</sup> added further that they disallowed any sale by advance till the goods arrived in the market. This opinion indicates that no goods could be considered safe from any unfair contract, whether from the point of view of price or otherwise, except after their arrival in the

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1. Huj., II, p. 624.

2. J. Ma., II, p. 13; Asl., pt. I, vol. I, p. 2 (2).

3. San., VIII, p. 7.

4. Ibid.

5. Mud., IV, p. 30.

market place. This view was an extended<sup>1</sup> ruling made by the Successors, since neither the Prophet nor the Companions had made any ruling or given their opinion on this subject.

b. The exchange of goods other than advanced goods

It is not permitted to exchange goods other than the specified advanced ones as an indemnity for these goods, while the contract of al-salam still exists, because it results in the sale of awaited goods before they have been received.<sup>1</sup> The Prophet is reported to have said:

"Whosoever buys foodstuff (or anything), he should not sell it (to others) before he receives it,<sup>2</sup> or possesses it."<sup>3</sup>

On the other hand, the Prophet is reported to have allowed the purchaser, after the specified time, to take half of the agreed goods of a sale by advance and to take back half of the price (the capital) of the goods, which he had given to the vendor.<sup>4</sup>

The Companions

Jābir b. 'Abd Allāh<sup>5</sup> and 'Abd Allāh b. 'Umar<sup>6</sup>

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1. Cf. Um., III, p. 134.

2. Muw. Y., p. 534; Um., III, p. 134.

3. Muw. Sh., p. 268.

4. J. Ma., II, p. 21.

5. Mud., IV, p. 125.

6. San., VIII, p. 14.



did not allow the seller to take back anything in a sale by advance, except sums of money or the goods themselves. Further, 'Abd Allāh b. 'Umar instructed that anyone who paid money in advance for goods, ~~from the seller~~ did not have the right of disposal of such goods till he received them.<sup>1</sup> Otherwise, such practice was considered as a sale of silver for silver which was forbidden. This was held by 'Abd Allāh b. 'Abbās.<sup>2</sup> 'Abd Allāh b. 'Abbās and 'Abd Allāh b. 'Umar, further, disallowed the sale by advance of unknown goods.<sup>3</sup> However, 'Umar b. al-Khaṭṭāb,<sup>4</sup> 'Abd Allāh b. 'Abbās<sup>5</sup> and 'Abd Allāh b. 'Umar<sup>6</sup> were of the opinion that there was no harm to any purchaser who, after the specified time, only took half of the agreed goods of a sale by advance and took back half of the value or price of the goods, which he had given to the vendor. According to 'Abd Allāh b. 'Abbās, this practice was generally recognized and accepted.<sup>7</sup>

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1. Um., III, p. 135; San., VIII, p. 14.
  2. Muw. Y., p. 549; Huj., II, pp. 648-49 and 654-55.
  3. San., VIII, p. 15.
  4. Huj., II, p. 595.
  5. Um., III, p. 135; Ath., p. 186 (842).
  6. San., VIII, p. 13.
  7. Huj., II, pp. 595-97; Um., III, p. 135; Ath., p. 186 (842).

The Successors

Qatāda and 'Amr b. Dīnār did not allow anything to be taken in a sale by advance, with the exception of capital (the price) or advanced goods.<sup>1</sup> Al-Ḥasan al-Baṣrī and Muḥammad b. Sīrīn,<sup>2</sup> Sa'īd b. al-Musayyib, Sulayman b. Yasār, 'Umar b. 'Abd al-'Azīz<sup>3</sup> and Aṭā' b. 'Abi Rabāh<sup>4</sup> were of the opinion that anyone who paid in advance for goods could not have the right of disposal of such goods till he had received them. But Ṭāwūs allowed the right of disposal of other goods if they were at the same value, except when the contract had already been rescinded, in which case the purchaser must take the capital only.<sup>5</sup> Moreover, al-Ḥasan al-Baṣrī and Muḥammad b. Sīrīn disallowed the taking of goods, in sale by advance, on the basis of weight when they had been bought on the basis of measure, or likewise.<sup>6</sup> Sa'īd b. Jubayr, however, prohibited buying goods in advance, on the basis of classification, saying that if the goods are wheat, give to me ten adhhāb,<sup>7</sup>

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1. San., VIII, pp. 14-15.

2. Ibid., p. 14.

3. Mud., IV, p. 36.

4. Um., III, p. 135.

5. San., VIII, p. 15.

6. Ibid., p. 14.

7. Dhahb (plural dhihāb, adhhāb, adhāhib or adhāhīb) is a certain measure of capacity, for corn, used by the people of al-Yaman, see Lan., I, p. 983.

if they are barley give twenty (adhhāb) and if they are dates give me thirty (adhhāb).<sup>1</sup> However, Sa'īd b. al-Musayyib allowed the purchaser to take more goods, than those previously bought by advance, by giving or adding further payment to the vendor.<sup>2</sup> 'Aṭā' b. Abī Rabāḥ did not allow any condition of payment, in salam transactions, in another place.<sup>3</sup>

Concerning the exchange of goods, in sale by advance, the practice where the purchaser took a part or half of them only and beside that the capital or price, was disallowed by the majority of the Successors, including Ibrāhīm al-Nakha'ī,<sup>4</sup> al-Sha'bī, Qatāda, al-Ḥasan al-Baṣrī and Shurayḥ.<sup>5</sup> They gave two alternatives only to the purchaser who could take either the advanced goods or the capital only. But 'Aṭā' b. Abī Rabāḥ<sup>6</sup> and Sa'īd b. Jubayr<sup>7</sup> agreed with the opinion of 'Abd Allāh b. 'Abbās in this matter, allowing the purchaser to take half the advanced goods and pay half the price. This opinion was held by the Companions, on the grounds that such a practice was generally accepted or recognized

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1. San., VIII, pp. 14-15.

2. Mud., IV, p. 66.

3. Ibid., p. 135.

4. Cf. Asl., pt. I, vol. I, p. 16 (53).

5. San., VIII, pp. 12-13.

6. M. in Um., VIII, p. 190.

7. San., VIII, p. 13.



by the Muslim community. To reconcile these two different views, we may suggest that such a practice was recognized and generally accepted by the Muslim community during the time of the Companions, but that it was no longer practised during the time of the Successors. The majority of the Successors ruled against such a practice, in order to avoid any confusion, injustice and disagreement between traders and customers.

c. Al-rahn (pledge) and al-kafīl (surety) in al-salam

It is permissible to pledge in a salam transaction, for its security. The legal precedent for such a contract was the Prophet who had bought some foodstuff from a Jew (on credit and the payment had to be made within a definite period) and he had pledged or mortgaged his iron armour to him.<sup>1</sup> According to al-Shāfi'ī, the armour also amounts to a surety in a salam transaction.<sup>2</sup>

The Companions

‘Abd Allāh b. ‘Umar and ‘Abd Allāh b. ‘Abbās agreed that there was no harm in mortgaging and surety in salam transactions, as long as they were limited to a specified time. Furthermore, ‘Abd Allāh b. ‘Umar considered such contracts as a form of guaranteed sale by advance,<sup>3</sup>

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1. Han. M., p. 164; cf. San., VIII, p. 11.

2. Um., III, p. 94.

3. Huj., II, p. 619; San., pp. 9-10.

which he considered the most valid form of sale.<sup>1</sup> However, 'Alī b. Abī Ṭālib disallowed such a contract.<sup>2</sup> It may be rather that he discouraged people from getting involved in such a salam transaction. Alternatively, he may have wanted to be on the safe side saying that no one should make such a contract at all, to avoid any risk of the parties being overburdened with liabilities. Further, 'Abd Allāh b. 'Umar disallowed stipulating any pre-condition for a surety (al-kafīl) in salam transactions.<sup>3</sup>

#### The Successors

Sa'īd b. Jubayr and al-Ḥasan al-Baṣrī disallowed pledging or mortgaging and surety in salam transactions.<sup>4</sup> The former prohibited, further, stipulating any pre-conditions for a surety in salam transactions.<sup>5</sup> It could be assumed that prohibition of such a practice, as with 'Alī b. Abī Ṭālib, was expressed for the purpose of preventing people from getting involved in salam transactions without fixing a specific time of repayment or delivery of goods, or to prevent any risk of being overburdened by any liability in such a sale. However, Sa'īd b. Jubayr made it clear that the reason for his prohibition of such a transaction was the existence of

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1. San., VIII, p. 9.

2. Ibid.

3. Haz. M., IX, p. 110.

4. San., VIII, pp. 9-10.

5. Haz. M., IX, p. 110.

an element of the guaranteed profit (al-ribḥ al-maḍmūn).<sup>1</sup>  
This implies that the vendor has been guaranteed his profit, whereas in fact future profit cannot be ensured, since the price of goods fluctuates.

In another report from the Successors, it appears that they saw no harm in mortgaging and surety in salam transactions. This was held by Muḥammad b. Sīrīn,<sup>2</sup> Ibrāhīm al-Nakha'ī,<sup>3</sup> al-Sha'bī,<sup>4</sup> 'Aṭā' b. Abī Rabāḥ and 'Amr b. Dīnār.<sup>5</sup> However, transaction by mortgaging and surety should be limited to a specified time, as was held by the Companions. According to Ibrāhīm al-Nakha'ī, if the pledged goods were damaged, salam transaction was void, because of the security (al-rahn) for the <sup>sold</sup> goods. If they were damaged, the vendor had the right on the pledged goods, and when the purchaser died, he could sell them.<sup>6</sup> If the pledged goods were less than the value of advanced goods, the purchaser had to pay the remainder and the salam transaction was void to the extent of the value of the security. If they were greater than the goods, the pledgee (the vendor) was the trustee for the excess.

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1. San., VIII, p. 9.

2. Um., III, p. 94.

3. J. Ma., II, p. 5; Ath., p. 188 (855); Asl., pt. I, vol. I, p. 18 (59).

4. San., VIII, pp. 10-11.

5. Um., III, p. 94.

6. Asl., pt. I, vol. I, pp. 42-43 (119).



- d. The absence of a condition stipulating that goods must be with the vendor

To support this legal notion, a Tradition was reported that 'Abd al-Raḥmān b. Abzā al-Khuzā'ī and 'Abd Allāh b. Abī Awfā al-Aslamī said:

"We used to share the booty (or the spoils of war) in the lifetime of the Prophet, when the peasants of al-Shām (Syria) came to us, we used to pay them in advance for wheat, barley and raisins to be delivered within a fixed period." They were asked "Who owned that crop?" They replied: "We never asked them about it."<sup>1</sup>

According to al-Ṣan'ānī, the above Tradition showed the legality of such practice<sup>2</sup> because the Prophet did not object to it.

#### The Companions

'Abd Allāh b. 'Abbās allowed the purchaser to take any goods in place of the previous advanced goods, if both parties agreed. For example, a man may sell linen or cloth but the purchaser may take wheat instead.<sup>3</sup> According to him, if the purchaser finds that the advanced goods do not exist when the fixed time arrives, he can take any goods to which both parties agree.<sup>4</sup> In

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1. San., VIII, p. 8; Mud., IV, p. 9.

2. San., VIII, p. 8.

3. Ibid., p. 16.

4. Ibid.

addition, 'Abd Allāh b. 'Abbās prohibited rescission in al-salam.<sup>1</sup> According to Ibn Ḥazm, the reason for the prohibition of rescission is that salam transaction is the sale of goods, without prior possession, which amounts to gharar. The permission of al-salam is one exception in such sales.<sup>2</sup>

### The Successors

Muḥammad b. Sīrīn, 'Aṭā' b. Abī Rabāḥ, Ṭāwūs and 'Amr b. Dīnār allowed the purchaser to take any goods in place of the previous goods, provided both parties agreed. However, the second goods could not be double charged or surcharged by the vendor.<sup>3</sup> Nevertheless, Sā'id b. al-Musayyib, Sulaymān b. Yasār<sup>4</sup> and Ibrāhīm al-Nakha'ī<sup>5</sup> disallowed taking other goods, after the time of delivery had expired, before the vendor returned the original money to buy the previous goods. This decision was made by the latter three Successors, possibly to prevent any risk of the purchaser being given other goods inequitably, or at a cheaper price, or to prevent the purchaser taking more goods than the quality of goods transacted previously. Further, al-Ḥasan al-Baṣrī, Shurayḥ, al-Sha'bī, Ibrāhīm al-Nakha'ī, Sa'id b. al-Musayyib, Ṭāwūs, Mujāhid, Sa'id b. Jubayr and al-Qāsim b. Muḥammad forbade purchasing

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1. Haz. M., IX, pp. 4-5.

2. Ibid., p. 5.

3. San., VIII, pp. 16-17.

4. Ibid., p. 18.

5. Asl. pt. I, vol. I, p. 45 (127).

half of the goods by advance (al-salam) and by rescinding the other.<sup>1</sup>

e. Al-salam and al-khiyār

'Aṭā' b. Abī Rabāḥ ruled that when the vendor delivered the goods and fulfilled the agreed terms of stipulated conditions or agreements and the goods were accepted by the purchaser, then the latter had no right of option (al-khiyār).<sup>2</sup> This was an extended ruling which had not been decided by the Prophet and the Companions.

2. Bay' al-'arāyā (singular al-'ariya) (A contract of barter in dates or sale of fresh dates by estimation)

Its definition, the Prophet and its origin in pre-Islamic times

Bay' al-'arāyā is the type of sale whereby the owner of an 'arāyā is allowed to sell the fresh dates while they are still on the palms by means of estimation, as dried harvested dates.<sup>3</sup> The Prophet was reported to have allowed the holder of an 'arāyā to barter the dates on the palm for the amount of dried dates it was estimated the palms would produce.<sup>4</sup> In a Tradition,

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1. Haz. M., IX, p. 4.

2. Um., III, p. 136.

3. Niha., III, p. 224.

4. Muw. Sh., p. 267; Muw. Y., p. 518; Um., III, p. 54; San., VIII, p. 103.



the Prophet allowed the contract of al-‘arāya up to five awsuq only. According to al-Shāfi‘ī, this means that such transactions were allowed up to five awsuq at a time.<sup>1</sup> He extended bay‘ al-‘arāyā in dates to grapes.<sup>2</sup> Furthermore, in another Tradition, the Prophet forbade the sale of dates for dates except after they had been estimated, in the sale of al-‘arāyā.<sup>3</sup>

According to Mālik, in an ‘arāyā contract it can be sold for an estimation of the amount of dried dates which will be produced. The crop is examined and estimated while still on the palm. This is allowed because it falls within the category of al-tawliya (resale at the stated original cost with no profit or loss to the seller),<sup>4</sup> al-iqāla (rescission of a sale)<sup>5</sup> and al-sharika (the partnership).<sup>6</sup> Had it been a form of sale, no one would have made someone else a partner in the produce until it was ready, nor would he have renounced his right to any part of it nor put someone in charge of it until the buyer had taken possession.<sup>7</sup> This sale had customarily been practised by the ancient Arabians<sup>8</sup>

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1. Um., III, pp. 54-55 and 57.
  2. Ibid., pp. 55 and 57.
  3. M. in Um., VIII, pp. 178-79.
  4. Infra chapter V, pp. 252-54.
  5. Supra chapter I, pp. 40-42.
  6. Infra chapter V, pp. 275-93.
  7. Muw. Y., p. 518.
  8. Orig., p. 312.

in pre-Islamic times.

No comment seems to have been made by the Companions and the Successors on this subject.

### Conclusion

The above sales are all of pre-Islamic transactions which are essentially invalid and not permissible in Islamic law, because they are contrary to the fundamental ethics and economic principles of al-Shari'a. They are gharar, hazardous or risky in nature and involve the purchase of undeliverable and unknown commodities and doubtful or uncertain objects. Gharar transaction was banned by the Prophet.<sup>1</sup>

The doctrine of al-gharar is introduced not in order to discourage commercial activities, whether in enterprise, venture or speculation in the widest meaning. But its purpose is to avoid any risk between the parties which is formed in any contract from the beginning. Any risk will result in profit for one party and comparative loss to the other party. This hazard brings about an inequitable or unfair and unjust gain and loss which amounts to gambling and usury. Beside the above twenty six gharar transactions, there are two permissible sales. The two permissible sales which were sanctioned are

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1. Haz. M., p. 160 (333); Muw. Sh., p. 274; Muw. Y., p. 554.

namely al-salam and bay' al-'arāyā. They become the exceptional permissible sales, in spite of the existence of two elements of gharar transactions in them. Such elements are the delay of delivery of a commodity or its not being present and the fact that the commodity is not clearly known. But those elements are avoided and solved by forming various standard conditions and rules whereby the sales, which are allowable and permissible, become exceptional.



CHAPTER IV

RESTRICTIONS ON SALES

This chapter covers the analysis of the restrictions on sales. Those restrictions are:

1. Sale of surplus water and other communal properties.

The use of water and other properties in pre-Islamic times and the Prophet.

The Companions and the Successors.

The Successors and the sale of pasture (al-kalā').

2. Sale of animals in exchange for animals on credit.

The Prophet, the Companions and the Successors.

3. Sale or exchange of precious metals and foodstuffs on credit.

Its pre-Islamic practice and the Prophet.

The Companions and the Successors.

4. Bay' dah yāzdah, dah duwāzadahor dah sīzdah (Sale by an agent and the capital specified when paying).

Its definition.

The Companions and the origin of this sale.

The Successors.

5. Al-bay' bi al-ṣakk (Sale by a written document).

The definition of al-ṣakk and its origin.

Al-ṣakk and medieval Europe.

Al-ṣakk, its history in Islam and the Companions.

The Successors.

The discussions in this chapter will concentrate on certain restrictions or limitations which were laid down by the Prophet and continued later in the times of the Companions and the Successors. Some new rulings and extended restrictions were further made and added by them later. Such restrictions are as follows:

1. The sale of surplus water and other communal properties

The use of water and other properties in pre-Islamic times and the Prophet

In pre-Islamic times, water, including that from rivers or wells, was public property if it flowed from any source in rural areas, town or in a piece of land in a tribe's territory. Every member of the community shared its usufruction. But it was considered private if it was in a private piece of land or dug by the owner of the land.<sup>1</sup> There were many private and public wells during this time.<sup>2</sup> For instance, in Mecca, before the digging of Zamzam, Quraysh had already dug wells in Mecca. Hāshim b. 'Abd Manāf dug a well of Badhdhar in Mecca and said: "I will make it a means of subsistence for the people."<sup>3</sup> This means he made it a public well.

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1. Taj., IX, p. 99; cf. Muf., VII, pp. 153 and 160.

2. Azr., II, pp. 214-24; Muf., VII, pp. 182-96.

3. IH., I, p. 136.



There were many other public wells such as Sajla, al-Ḥafr, Suqayya, Umm Aḥrād, al-Sunbula, al-Ghamr and many others.<sup>1</sup> By this time, there were public dams<sup>2</sup> and canals<sup>3</sup> for public irrigation and use,<sup>4</sup> e.g. the dam of Ma'rib in Yemen.<sup>5</sup>

When the Prophet emigrated to Medina, the Jews owned a well known as 'Bi'r Rūma', which was situated in al-'Aqīq al-Aṣghar in that city.<sup>6</sup> They were selling water from this well to the people in the city until 'Uthmān b. 'Affān bought it from them, at a price of thirty five thousand dirhams and made it a public well.<sup>7</sup> Concerning water the Prophet is reported to have said:

- i. "Do not withhold the surplus water of a well from people."<sup>8</sup>
- ii. "Excess water is not withheld in order to prevent herbage (pasture) from growing."<sup>9</sup>

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1. IH., I, pp. 136-39.
  2. Muf., VII, pp. 207-08.
  3. Ibid., pp. 198-99 and 212-13.
  4. Ibid., pp. 213-15.
  5. IH., I, pp. 12-13; Muf., VII, pp. 209-12.
  6. I. Shu., I, p. 152.
  7. For details see I. Shu., I, pp. 152-55.
  8. Muw. Sh., p. 297; Muw. Y., p. 638; San., VIII, p. 105.
  9. Muw. Y., p. 638; San., VIII, p. 105.

- iii. "He who prevents others from using the surplus water and thereby prevents the growing of more herbage will be prevented by God on the Day of Resurrection from any advantage."<sup>1</sup>

Other communal properties in pre-Islamic times and the Prophet

Insufficient water caused scarcity of grass. The possession of both signified the symbol of power, dignity and wealth. They were considered the most valuable properties in worldly life. Many wars had been waged because of these two precious commodities. Water and pasture had been the reason for the Romans and the Sāssānians to invade and conquer al-Shām (Syria).<sup>2</sup> However, the pasture (al-kalā') and fire(wood), together with water were public properties in pre-Islamic times, if they were on public land, or if they belonged to a tribe, being on that tribe's land.<sup>3</sup>

When Islam came, the Prophet forbade the sale of water,<sup>4</sup> salt,<sup>5</sup> pasture and fire.<sup>6</sup> They were articles of common use, res omnium communes and they are

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1. Khar., p. 55; cf. Ah. M., XIII, p. 180 (7435); San., VIII, p. 105.

2. Muf., VII, p. 163.

3. Ibid., pp. 153-54.

4. Khar., p. 55; San., VIII, p. 106; Y., p. 107 (338).

5. Y., p. 109 (345); Amw., pp. 295 (736).

6. Khar., p. 55; Y., p. 101 (315).

considered as not amenable to possession. The Prophet regarded pasture, water and fire as the property of the able (and rich) people and as the strength of the disabled (and needy) people. Therefore, it was not permitted to prevent such people from (using) them.<sup>1</sup>

### The Companions

In the case of water as a public property, 'Umar b. al-Khaṭṭāb<sup>2</sup> and Abū Hurayra<sup>3</sup> gave more right of drinking and washing to wayfarers (travellers) than residents. In another case, 'Umar b. al-Khaṭṭāb ordered Muḥammad b. Maslama to let al-Daḥḥāk pass through his irrigation ditch from a large source of water in Muḥammad's land,<sup>4</sup> in order to give more opportunity to al-Daḥḥāk to use the water sufficient to his need. Abū Hurayra<sup>5</sup> and 'Abd Allāh b. 'Amr b. al-'As<sup>6</sup> further prohibited selling excess water. In support of the idea that water is public property it was reported that the Prophet had given a parcel of land where there had been a source of water as a private estate to 'Alī b. Abī Ṭālib in Dhū

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1. Khar., p. 55.

2. Y., p. 102 (320); Amw., p. 297 (737).

3. Amw., p. 207 (738).

4. Muw. Sh., pp. 296-77; Muw. Y., p. 639; Y., pp. 110-11 (349).

5. Cf. San., VIII, pp. 104-05; Haz. M., IX, p. 7.

6. Y., p. 108 (339); Amw., p. 301 (747); Haz. M., IX, p. 7.



al-'Ushayra.<sup>1</sup> Later, the caliph 'Umar b. al-Khaṭṭāb had given 'Alī b. Abī Ṭālib another piece of land. Subsequently, the latter had dug a well and given it as a public charitable well for the poor and needy, wayfarers, for those in the neighbourhood (or vicinity) and also for those from remote places, for their lifetime, both in peace and war. Then he said:

"The charitable gift could not be given away and could not be inherited, unless God bestowed it upon anyone who governed the earth and the people on it. He is the Best of all benefactors."<sup>2</sup>

This suggested that when water became public it could not be given away as a charitable gift and donation nor could it be inherited. Therefore, it automatically became an unsaleable object.

### The Successors

Ṭāwūs,<sup>3</sup> al-Qāsim b. Muḥammad<sup>4</sup> and 'Ubayd Allāh b. 'Abd Allāh b. 'Utba b. Mas'ūd<sup>5</sup> prohibited selling surplus water off one's land. Further, Sa'īd b. al-Musayyib,<sup>6</sup> 'Aṭā' b. Abī Rabāḥ<sup>7</sup> and 'Umar b. 'Abd al-'Azīz prohibited

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1. Dhu al-'Ushayra was a place between Mecca and Medina near Yanbu'. See Yaq., III, p. 681.
  2. I. Shu., I, pp. 219-21.
  3. Amw., p. 301 (745).
  4. Ibid., p. 296 (735).
  5. Haz. M., IX, p. 8.
  6. Y., p. 109 (341).
  7. Ibid. (343).

the sale of water from a well for cattle. 'Umar said:

"If a man abandons the vicinity of a well used for cattle and sells the water, the sale has no validity and the water goes to those having priority rights, against the seller without any payment of price. But if the seller comes back, he has more right to his water."<sup>1</sup>

To show that water was a public property, Sufyān b. 'Uyayna prohibited any obstruction of its use from its original place by the public.<sup>2</sup> According to Mālik b. Anas, the owner of water should not prevent wayfarers nor his neighbours from using his water, whether for their own consumption or for their animals.<sup>3</sup> However, according to Abū 'Ubayd it was generally accepted, by the majority of scholars, that the sale of surplus water was allowed if the vendor supplied and carried and transported it by his own effort, especially for consumption or irrigation and as long as such sales did not have any grievous consequences to other users of the water.<sup>4</sup> This view had been held by Qatāda b. Di'āma,<sup>5</sup> 'Aṭā' b. Abī Rabāḥ was asked about the sale of water from waterskins (al-qirab). He said:

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1. Y., p. 109 (342).

2. Amw., p. 302 (750).

3. Ibid., (751 and 752).

4. San., VIII, p. 106; Amw., p. 302 (753).

5. Y., p. 109 (343).

"There is no harm in it because the man (the seller) draws and carries it, and it is not like surplus water flowing on (along or out of) the earth."<sup>1</sup>

Therefore, water is considered as res nullius (that which has no owner, therefore mubāh or permissible to be used by anybody) and it is the common property of all.<sup>2</sup> This was the opinion of Abū Yūsuf.<sup>3</sup>

The above accounts show that the Successors still prohibited the sale of surplus water and considered it as public property. Wayfarers, cattle and neighbours or nearby residents should be given first priority to use and consume water. However, surplus water may be sold if someone has drawn, carried or transported it by his own effort for the purpose of selling it, and as long as such sales do not cause any difficulties or hardship to the public.

#### The Successors and al-kalā'

The Companions did not make any comment on this issue, but the Successors, including Ṭāwūs, 'Ikrima<sup>4</sup> and al-Ḥasan al-Baṣrī<sup>5</sup> forbade the sale of grass or pasture. The latter prohibited such sales, whether from pasture land, plain land, mountain or hill.

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1. Y., p. 109 (344).

2. Nicolas P. Agnides, Mohammedan Theories of Finance (Lahore, n.d.), p. 493.

3. Khar., p. 55.

4. Amw., p. 301 (745-46).

5. San., VIII, p. 107.



No other comments seem to have been made by the Companions and the Successors about the prohibition on selling fire(wood) and salt.

2. Sale of animals in exchange for animals on credit

The Prophet forbade bartering live animal for live animal on credit.<sup>1</sup> But he allowed such a sale if it was made from hand to hand or by mutual delivery and with immediate delivery (yadan bi yadin).<sup>2</sup> Otherwise, such a contract amounts to usury. But before the prohibition of usury, the sale of animal in exchange for animal on credit had been permitted.<sup>3</sup> It appears that the contract had been widely practised in pre-Islamic times.

The Companions

‘Abd Allāh b. ‘Umar disallowed selling one camel for two camels on credit.<sup>4</sup> Further, ‘Abd Allāh b. ‘Abbās considered one camel was, sometimes, better than two camels.<sup>5</sup> On one occasion, ‘Abd Allāh b. ‘Abbās was asked about the barter of one animal for another and he

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1. Huj., II, pp. 487-88 and 493; Muw. Sh., p. 283.

2. Huj., II, p. 495; Ah. M., VIII, pp. 182-85 (5885).

3. Taha., IV, p. 60.

4. Huj., II, p. 488.

5. Um., III, p. 119; San., VIII, pp. 21-22.

replied: "It is not permitted to barter heads of stock for other heads on credit."<sup>1</sup> Rāfi' b. Khadīj bought a camel in exchange for two camels from a man and Rāfi' gave one of them to the man at the time of the transaction and told him that he would give him the other the next day for certain.<sup>2</sup> From these three reports it may be assumed that the Companions continued to prohibit the practice of bartering live animals for live animals on credit unless their delivery in the immediate future was assured. To support this, 'Abd Allāh b. 'Umar opined that there was no harm in bartering animal for animal on credit provided the time of delivery was specified.<sup>3</sup>

It can be argued that 'Alī b. Abī Tālib was reported to have bartered his camel, called 'Uṣayfīra, for twenty camels on credit.<sup>4</sup> According to al-Shaybānī, in another report, 'Alī b. Abī Tālib was against such transactions on the basis that he had prohibited the bartering of a camel for two camels on credit, and similarly the bartering of one sheep for two on credit. The second opinion of 'Alī reflected the ruling held by Abū Ḥanīfa.<sup>5</sup>

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1. Huj., II, p. 495.

2. San., VIII, p. 22.

3. Ibid., p. 25.

4. Muw. Sh., p. 282; Muw. Y., p. 545; Um., III, pp. 37 and 119; San., VIII, p. 22.

5. Muw. Sh., pp. 282-83; cf. Huj., II, pp. 489-93 and 498; M. in Um., VIII, p. 119; San., VIII, p. 22.

away  
In order to explain the apparent contradiction of 'Alī's transaction, it may be supposed that he made it on the basis of certain delivery of the twenty camels at a specified time or on the basis of some guarantee and of different species. 'Alī's prohibition was supported by other Companions. For example, 'Abd Allāh b. Mas'ūd asked 'Atrīs b. 'Urqūb to dissolve such a contract of bartering or selling a known young she-camel on credit at specified time, possibly it had been transacted without a guarantee, because 'Abd Allāh disallowed it.<sup>1</sup> Moreover, 'Abd Allāh b. Mas'ūd forbade such a contract if it was made at unspecified times.<sup>2</sup> Another example supporting the claim that 'Alī must have had a guarantee is given by 'Abd Allāh b. 'Umar who bought a female (a mount) riding camel for four camels of different species, on the basis of a guarantee that he would deliver them in full to the buyer at al-Rabadha,<sup>3</sup> at a specified time. Finally, it is known that 'Umar b. al-Khaṭṭāb also prohibited such sales.<sup>4</sup> It may be suggested that such

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1. Huj., II, pp. 483-84; San., VIII, pp. 23-24. Regarding Alī's prohibition of such sales, see Ath., pp. 186-87 (845); cf. Huj., II, p. 479; San., VIII, p. 26.

2. San., VIII, p. 23.

3. Muw. Sh., p. 282; Muw. Y., p. 545; Um., III, pp. 37 and 119. Al-Rabādha was an ancient village in Najd near Medina, where Abū Dhar al-Ghifārī was buried. See Waq., II, p. 535 (n.2); Niha., II, p. 183; Lis., III, p. 492..

4. San., VIII, pp. 24 and 26; Huj., II, p. 488.



prohibition was made by him, if it was made <sup>until</sup> / an unspecified time and without a guarantee and ~~sof~~ the same species. In this case, Mālik specified clearly that there was no harm in exchanging a riding camel of a good breed for two or more pack-camels, if they were from inferior stock. There was no harm in bartering two of them for one with delayed terms, if they were different and their difference was clear.<sup>1</sup> It was permitted for someone to advance something on animals for a fixed term and describe the amount and pay its price in cash.<sup>2</sup>

### The Successors

The majority of the Successors prohibited the sale of animals for animals on credit. Such were Sa'īd b. al-Musayyib, 'Ikrima, Qatāda, Muḥammad b. Sīrīn,<sup>3</sup> Shurayḥ,<sup>4</sup> 'Aṭā' b. Abī Rabāḥ,<sup>5</sup> Muḥammad b. al-Ḥusayn<sup>6</sup> and Ṭāwūs.<sup>7</sup> But al-Ḥasan al-Baṣrī differed from others on this subject, because he was of the opinion that the transaction was allowed if the exchange involved animals from different species<sup>8</sup> and its delivery at a specified

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1. Muw. Y., p. 545.

2. Ibid., p. 546.

3. San., VIII, pp. 20-22 and 24.

4. Cf. Huj., II, p. 495; San., VIII, p. 24.

5. Um., III, p. 119; Mud., IV, p. 25.

6. San., VIII, p. 20.

7. Mud., VIII, p. 25; San., VIII, p. 21.

8. San., VIII, p. 20.

time.<sup>1</sup> However, on another occasion Sa'īd b. al-Musayyib said there was no usury in the case of exchanging animals for animals on credit.<sup>2</sup> He and al-Ḥasan al-Baṣrī stated that such transactions were allowed if they were made at a specified time.<sup>3</sup> Therefore, such transactions are not considered as the exchange of gold, silver or measurable or weighable foodstuffs or drink.<sup>4</sup>

### 3. Sale or exchange of precious metals and foodstuffs on credit

#### Its pre-Islamic practice and the Prophet

In pre-Islamic times, the Arabs used weights in exchanging gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates and salt for salt by counterpoising.<sup>5</sup> Such a transaction was known as al-murāṭala.<sup>6</sup> In addition, gold and silver were used to specify their prices and to purchase necessary goods and others, even after the existence of dīnārs and dirhams.<sup>7</sup> If they were exchanged by calculating their quantity, such a contract was called al-mubādala.<sup>8</sup> But

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1. San., VIII, p. 25.

2. Muw. Sh., p. 275; Muw. Y., p. 546; Um., III, p. 119; San., VIII, p. 20.

3. San., VIII, p. 25.

4. Ibid., p. 21.

5. Muf., VII, p. 397.

6. Muw. Y., p. 532.

7. Muf., VII, p. 416.

8. Ibid., p. 397.

was an  
if there/exchange of gold for gold, silver for silver,  
gold for silver or vice versa, it was called al-ṣarf.<sup>1</sup>  
In Islamic law, such exchange is regarded as 'sale of  
price for price' (bay' al-thaman bi al-thamān), and  
each price is a consideration for the other.<sup>2</sup> However,  
the Arabs, during pre-Islamic times, added or lessened  
the quantity of such goods differentially while paying  
them back at a limited period of time. All these  
transactions were widely practised during these times,  
which led to widespread cheating, fraudulence and  
profiteering in transactions.<sup>3</sup>

The Prophet is reported to have prohibited selling  
gold in exchange<sup>4</sup> for gold or silver for silver by  
means of weighing (waznan bi waznin) and foodstuffs,  
such as wheat for wheat (al-ḥinṭa or al-burr), barley  
for barley (al-sha'īr), dates for dates (al-tamr) and  
salt for salt (al-milh) by means of measuring them  
(kaylan bi kaylīn) on credit and inequally. All surpluses  
or excesses were considered usury.<sup>4</sup> But he allowed such  
transactions of equal weight, measurement or quantity  
(mithlān bi mithlin) and from hand to hand or by mutual  
delivery (yadan bi yadin). He is also reported to have

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1. Muw. Y., p. 531; Muf., VII, p. 397.

2. Intro., p. 154.

3. Muf., VII, pp. 416-18.

4. Han. M., p. 159 (330); Ath., p. 183 (833); cf.  
Muw. Sh., p. 289; cf. Um., III, p. 30.



permitted any contract of exchange between gold for silver, silver for gold, wheat for barley, barley for wheat, dates for salt, salt for dates from hand to hand or by mutual delivery as the parties wished.<sup>1</sup> Otherwise, such transaction was considered by the Prophet as usury,<sup>2</sup> and should not be unequal in weight,<sup>3</sup> or measurement.

If any article of the species of price, i.e. gold or silver, is sold for an article of the same kind, Islamic law requires that there must be mutual delivery and those articles must be equal in weight one to the other. It makes no difference whether gold or silver is sold in the shape of coins or ornaments or otherwise. These articles are treated as price, because of the very nature of these precious metals. If gold is sold for silver or the reverse, Islamic law insists on equality in the bargain and the delivery of the articles must be at the time of the transaction. The conditions were made for avoiding the effect of the application of al-ribā (usury).<sup>4</sup>

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1. Cf. Muw. Sh., p. 272; M. in Um., VIII, p. 173; San., VIII, pp. 32, 34 and 116-19.
  2. San., VIII, pp. 116-18 and 122.
  3. Muw. Y., pp. 527-29; San., VIII, pp. 122 and 124.
  4. Abdur Rahīm, The Principles of Muhammadan Jurisprudence (Lahore, 1970), p. 293.

The Companions

‘Umar b. al-Khaṭṭāb,<sup>1</sup> ‘Abd Allāh b. ‘Umar<sup>2</sup> and Jābir b. ‘Abd Allāh<sup>3</sup> forbade the exchange of gold for gold, silver for silver except of equal weight or quantity (mithlan bi mithlin) and value and such goods to be delivered immediately and without delay. Otherwise, such transaction was considered usury. ‘Alī b. Abī Ṭālib<sup>4</sup> and ‘Abd Allāh b. Mas‘ūd<sup>5</sup> considered that the exchange of silver for silver and gold for gold was usury, except if it was made immediately, of equal quantity and value. In addition, ‘Abd Allāh b. ‘Abbās disallowed any condition stipulated in sale of silver.<sup>6</sup> But he and ‘Abd Allāh b. Mas‘ūd allowed any quantitative disparity (al-tafāḍul) in an exchange of gold for gold or silver for silver if it was from hand to hand or by mutual delivery.<sup>7</sup> But Jābir b. ‘Abd Allāh permitted such quantitative disparity if such exchange was made between the different precious metals from hand to hand or by mutual delivery.<sup>8</sup>

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1. Muw. Sh., pp. 289-90; Muw. Y., pp. 528-32; San. VIII, pp. 116, 121, 123 and 127.
  2. San., VIII, pp. 119, 125-26.
  3. Ibid., p. 128.
  4. Ibid., p. 124.
  5. Ath., p. 184 (835); San., VIII, pp. 123-24 and 127-28.
  6. San., VIII, p. 119.
  7. Haz. M., VIII, p. 493.
  8. Ibid., p. 492.

In the case of foodstuffs, 'Abd Allāh b. 'Umar forbade the exchange of unequal weight of the different foodstuffs on credit, but he allowed such a transaction when it was made from hand to hand or by mutual delivery.<sup>1</sup> Sa'd b. Abī Waqqāṣ elaborated his ruling that such exchange was allowed if it was made between the foodstuffs of equal quantity or weight by mutual delivery.<sup>2</sup> This was also held by 'Ubāda b. al-Ṣāmit.<sup>3</sup>

### The Successors

In the case of al-ṣarf, Qatāda, 'Ikrima,<sup>4</sup> Ibrāhīm al-Nakha'ī<sup>5</sup> prohibited the sale of gold for gold or silver for silver on credit. But Sa'īd b. Jubayr and Ṭāwūs allowed any exchange of silver for gold or vice versa,<sup>6</sup> if it was made without credit. However, al-Ḥasan al-Baṣrī allowed it, if it was made at the price of the market,<sup>7</sup> without credit. Further, Muḥammad b. Sīrīn Ibrāhīm al-Nakha'ī, Ma'mar b. Rāshid and Mujāhid prohibited selling gold for silver on credit.<sup>8</sup> But Sa'īd b. al-Musayyib allowed selling gold for gold and silver

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1. San., VIII, p. 30; Haz. M., VIII, pp. 484-85.
  2. Muw. Y., p. 539.
  3. Haz. M., VIII, pp. 491-92.
  4. San., VIII, pp. 117 and 120.
  5. Ibid., p. 121.
  6. Ibid., p. 126.
  7. Ibid., p. 128.
  8. Ibid., p. 129.



for silver by weight,<sup>1</sup> without credit. Moreover, in the case of an exchange of iron for copper on credit, Sa'īd b. al-Musayyib permitted it. But al-Ḥasan al-Baṣrī prohibited it. Ḥammād b. Abī Sulaymān permitted the exchange of fals (a small copper coin) for falsayn (two small copper coins).<sup>2</sup> However, Muḥammad b. Sīrīn allowed the exchange of iron for iron.<sup>3</sup> Al-Ḥasan al-Baṣrī, al-Sha'bī<sup>4</sup> and Ibrāhīm al-Nakha'ī<sup>5</sup> allowed to sell an embellished sword, belt and ring with any price, less or more or on credit. But Muḥammad b. Sīrīn disallowed the exchange of a ring with a stone for silver. Shurayḥ emphasized that a gold ring should be weighed, before selling.<sup>6</sup>

Regarding foodstuffs, the Successors prohibited the exchange between the same kind of foodstuffs with unequal quantity or weight on credit, but they allowed it if it was made from hand to hand and of equal quantity. They were Ibrāhīm al-Nakha'ī,<sup>7</sup> al-Ḥasan al-Baṣrī,<sup>8</sup> Sulaymān b. Yasār<sup>9</sup> and Sa'īd b. al-Musayyib.<sup>10</sup>

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1. Muw. Sh., pp. 290-91; Muw. Y., p. 532.
  2. San., VIII, p. 37.
  3. Um., III, p. 37.
  4. San., VIII, p. 69.
  5. San., VIII, pp. 69-70; J. Ma., II, p. 37.
  6. San., VIII, p. 70.
  7. Muw. Sh., p. 291.
  8. San., VIII, pp. 30.
  9. Ibid., p. 33.
  10. Muw. Sh., pp. 291-92; Muw. Y., p. 530; Mud., IV, p. 27.

Further, 'Aṭā' b. Abī Rabāḥ allowed an exchange of barley for wheat with unequal quantity, if it was made from hand to hand or by mutual delivery.<sup>1</sup> However, Mujāhid and Qatāda considered it permissible if an exchange was made between wheat (al-ḥinṭa) for flour (al-daḡīq) and flour for bread (al-khubz).<sup>2</sup> This exchange was allowed if it was made from hand to hand or by mutual delivery. Ibrāhīm al-Nakha'ī, further, allowed any exchange of a loaf of bread for a loaf of bread with any quantitative disparity, because it was customarily practised by most people.<sup>3</sup> According to Qatāda, the exchange of flour for wheat must be made by means of weighing. This was also held by al-Ḥakam b. 'Uṭayba.<sup>4</sup> Al-Ḥasan al-Basrī and Qatāda ruled that the exchange of flour for flour may be made if they were from different grains and measurements.<sup>5</sup> Hence, Ibrāhīm al-Nakha'ī disallowed the exchange of al-sawīq (a kind of mush made of wheat or barley with or without sugar and dates) for wheat, because there was an excess in it.<sup>6</sup>

The Successors extended this type of transaction from the exchange of precious materials and foodstuffs to the exchange of a cloth for cloth on credit. Ibrāhīm al-Nakha'ī, al-Ḥasan al-Basrī<sup>7</sup> and al-Qāsim b.

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1. Haz. M., VIII, p. 476.

2. San., VIII, pp. 30-31.

3. Mab., XIV, p. 31.

4. San., VIII, p. 31.

5. Ibid.

6. Ibid.

7. Ibid., pp. 35-36.

Muḥammad<sup>1</sup> considered there to be no harm in such exchange, as long as the transaction was made between different materials. But al-Sha'bī, 'Aṭā' b. Abī Rabāḥ, Ṭawūs and Sa'īd b. al-Musayyib ruled that such exchange was permissible even though it was made between the same kind of materials. The latter stated that usury appeared in the materials which were measured (by dry measurement - al-mikyāl) or weighed only.<sup>2</sup> But Muḥammad b. Sīrīn required a certain description or specification of the transacted goods, in this type of sale.<sup>3</sup> Nevertheless, Sulaymān b. Yasār held that such a sale should be made from hand to hand or by mutual delivery.<sup>4</sup> The last condition was considered by the latter as the only condition for its validity.

4. Bay' dah yāzdah, dah duwāzadah or dah sīzdah  
(Sale by an agent and the capital specified  
when paying)

#### Its definition

According to al-Shaybānī, there were three types of such a sale. First, the vendor sells the goods with 'dah yāzdah' or with ten (for goods bought) for eleven

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1. Mud., IV, p. 24.  
2. San., VIII, pp. 35-37.  
3. Ibid., p. 36.  
4. Mud., IV, p. 24.



to be charged. Secondly, with 'dah duwāzadah' or with ten for twelve, and thirdly with 'dah sīzdah' or with ten for thirteen. In this sale, the purchaser has the right of option, if he did not know the price before the contract, if however he did know then he cannot reject it.<sup>1</sup>

#### The Companions and the origin of this sale

No comment had ever been made by the Prophet on this particular sale. But among the Companions, 'Abd Allāh b. 'Umar prohibited such a sale and considered it as usury.<sup>2</sup> 'Abd Allāh b. 'Abbās also forbade such a sale and regarded it as an alien sale.<sup>3</sup> This indicated that such a sale had been practised in foreign countries in pre-Islamic times and came to Arabia in the time of Islam. As these terms are Persian, this kind of contract probably came from Persia. But 'Abd Allāh b. Mas'ūd permitted it if the maintenance was counted on the price and there was no extra charge for it.<sup>4</sup>

#### The Successors

Some of the Successors, like 'Ikrima, al-Ḥasan al-

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1. Asl., pt. I, vol. I, pp. 173-74 (40).
  2. San., VIII, p. 232.
  3. Ibid., pp. 232-33.
  4. Haz. M., IX, p. 14.

Baṣrī and Masrūq forbade this sale.<sup>1</sup> But the others, one of them Muḥammad b. Sīrīn, allowed such a sale, on the condition that the maintenance was counted on the price, before the contract.<sup>2</sup> Shurayḥ, Ibrāhīm al-Nakha'ī<sup>3</sup> and Sa'īd b. al-Musayyib<sup>4</sup> approved of such a sale. Sufyān al-Thawrī agreed with their opinion on the condition that the vendor stated the original price,<sup>5</sup> or the cost of maintenance.

5. Al-bay' bi al-ṣakk (The sale by a written document)

The definition of al-ṣakk and its origin

Al-ṣakk (plural al-aṣukk, al-ṣikāk or al-ṣukūk) was the written document. It was arabicized from a Persian word 'jak'<sup>6</sup> or 'chak'<sup>7</sup> which means a 'written paper (or book)',<sup>8</sup> or debenture, or written acknowledgment of a debt of money or property or other things and a written statement of commercial contracts, inter alia purchase or sale, transfer, or the like.<sup>9</sup> It was also called

1. Haz. M., IX, p. 14.

2. San., VIII, p. 233.

3. Ibid.

4. Haz. M., IX, p. 14.

5. San., VIII, p. 233.

6. Lan., II, p. 1709.

7. Lis., X, p. 457; Lan., II, p. 1709.

8. Lis., X, p. 457.

9. Lan., II, p. 1709.

'yād gārī' and 'yād dāshat'.<sup>1</sup> Al-ṣakk was also known as al-wathīqa (plural al-wathā'iq) or al-dhukr (plural al-adhkār) and dhukr al-ḥaqq (plural adhkār al-ḥuqūq). The branch of legal science which deals with these written documents is called the Science of al-Shurūṭ (singular al-shart), 'stipulations'.<sup>2</sup>

Al-ṣakk, its applicability and medieval Europe and al-ṣakk

The commercial law or the law of contracts and obligations was laid down according to customary law which respected the main principles and institutions of al-Shari'a (Islamic law), but showed a greater flexibility and adaptability, supplementing it in many respects, even though al-Sharī'a does not recognize the liberty of the contract. According to Schacht, several institutions of this customary commercial law of Islam were transmitted to medieval Europe through the intermediary of the law merchant, the customary law of international trade. One such Islamic institution of the customary commercial law was transmitted to medieval Europe, as was attested by the term cheque, from Arabic al-ṣakk (written document).<sup>3</sup>

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1. Huj., II, p. 701 (n.1)

2. Intro., p. 82 (n.1); cf. J.A. Wakin, The Function of documents in Islamic Law (New York, 1972), p. 1 (n.1)

3. Intro., p. 78.



Al-ṣakk, its history in Islam and the Companions

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The Umayyad administration adopted the method of paying the troops by documents (ṣukūk) which entitled the holder to draw a fixed amount of foodstuffs from the Government granaries after the harvest. As the result, speculation as to the fluctuating price of foodstuffs gave rise to considerable buying and selling of these Army pay documents (ṣukūk).<sup>1</sup>

It was also reported by Mālik<sup>2</sup> that certain documents (ṣukūk) were assigned to the people of Medina entitling them to foodstuffs that were being brought to al-Ḥijāz and collected at the coastal city of al-Jār. Therefore the people in the city began to trade with these documents before they actually received their entitlements of foodstuffs, a practice which led to risk or even usury, if the exchange involved unequal quantity.<sup>3</sup> Zayd b. Thābit and one of the Companions went to Marwān b. al-Ḥakam (d. 65 A.H.), the Governor of Medina during the time of Mu'āwiya b. Abī Sufyān (41-61 A.H.). They said: "Do you consider usury sales as legitimate, O Marwān?" "I seek refuge with God (from that)." "What is that?" They said, "These ṣukūk are being bought and sold before the receipt of their equivalence." Marwān, whereupon,

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1. C. Com., p. 12.

2. Muw. Y., p. 535.

3. Cf. Muw. Y., pp. 541-42; Farhat J. Ziadeh, Al-Muwattā' As A Source for the Social and Economic History of the Ḥijāz, Islamic Studies, 18 (Islamabad, 1979), p. 303.

sent his guards to track down these documents, to remove them from the hands of their holders and to return them to their original owners.<sup>1</sup>

The above account indicates that the institution of al-ṣakk may have been introduced in the Muslim community in Medina in the late first century of Hijra (or Islam). By this time, the use of al-ṣakk was prohibited and it was regarded as amounting to a usurious sale. The practice of using al-ṣakk had never been mentioned by the Prophet.

### The Successors

Sale by written documents was recognized by the Successors. The Successors permitted such transaction provided that it met certain conditions. This sale, however, was regarded as invalid because of its risky or hazardous nature. According to Ibrāhīm al-Nakha'ī, any contract which was made according to al-ṣakk was lawful provided it was intended, or certified and confirmed, for the purpose of a contract. If this was not so, al-ṣakk could not be referred back to its owner.<sup>2</sup> In such a case, it had no value for any purpose. If the buyer accepted goods on the basis of such a sale and

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1. Muw. Y., p. 535. Muslim mentioned that Abū Hurayra had forbidden bay' al-ṣikāk and he considered such transaction as selling foodstuffs before possession. See Mus., III, p. 803 (365); Naw. Mus., X, pp. 171-72.
  2. San., VIII, p. 108.

they were consequently destroyed or damaged with him, he was liable to repay their value by cash. This was the view held by al-Sha'bī.<sup>1</sup> However, according to al-Thawrī, Ibn Abī Laylā was of the opinion that if the seller and the holder of al-ṣakk met and the latter, then, acknowledged and confirmed or assured the contents or the value of al-ṣakk, then the transaction was permissible and legally acceptable.<sup>2</sup>

### Conclusion

The prohibition of these five kinds of transactions was for ~~for~~ reasons of necessity; ~~they~~ involved in a variety of activities in which the nature of certain elements was unclear with regard to usurious tendencies. However, in the case of the sale of water and other communal properties, the prohibition seems to have involved the idea of harming other people and their property.

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1. San., VIII, p. 108; Huj., II, pp. 700-01.

2. San., VIII, p. 108.



CHAPTER V

PARTNERSHIPS IN BUSINESS

TRANSACTIONS AND AL-SHUF'A (PRE-EMPTION)

This chapter will investigate the early state of the juridical growth of Islamic partnerships and pre-emption. In this chapter the examinations will be made on:

I. i. Al-muḍāraba (Sleeping or dormant partnership)

The definition of al-muḍāraba (al-qirād or al-muqāraḍa) and accomendacio or commenda in medieval Europe, its pre-Islamic background, the Prophet, the Companions and the Successors and their legal rulings on conditions for capital, maintenance of the agent-manager, dispute, transgression, destruction of capital and the division of profit.

ii. Quasi-muḍāraba transactions:

1. Bay' murābaḥa (Partnership between investors and borrowers in profit-sharing re-sales or resale at specified surcharge on the stated original cost which represents the profit)

Its definition and pre-Islamic origin, the legal rulings of the Companions and the Successors.

Bay' al-raqm (Sale by number)

2. Bay' al-tawliya (The re-sale at the stated original cost with no profit or loss to the seller)

Its definition and pre-Islamic origin, the legal rulings of the Prophet, the Companions and the Successors.

3. Bay' al-waḍī'a (The re-sale at a discount from the original cost)

iii. Three other kinds of quasi-muḍāraba contracts:

1. Al-samsara (Brokerage)

Its definition, its origin and the practice before Islam, the legal rulings of the Companions and the Successors.

2. Bay' al-fuḍūlī (The sale by an uncommissioned agent - negotiorum gestor)

Legal rulings of the Prophet, the Companions and the Successors.

3. Agricultural sharecropping (métayage agricole)

The sharecroppings consist of five pre-Islamic contracts: al-muḥāqala, al-mukhābara, al-muzāra'a, kirā' al-ard and al-musāqāt.

Their respective definitions and pre-Islamic backgrounds, the rulings of the Prophet, the Companions and the Successors.

The Companions and the Successors with the contract of al-qabāla or al-ḍamān (locatio).

II. Al-sharika (Mercantile partnership or commercial enterprise in business)

Its definition, pre-Islamic background, origin and legal rulings of the Qur'ān, the Prophet, the Companions and the Successors.

Two other kinds of partnership (al-sharika):

1. Sharikat al-mufāwada (The unlimited investment partnership, societas quaetus)

Its definition, origin and the rulings of the Successors.

2. Sharikat al-'inān (The limited investment partnership)

Its definition and pre-Islamic origin and the legal rulings of the Successors.

General issues in partnership.

III. Al-shuf'a (Pre-emption)

Its definition, pre-Islamic background, the legality of al-shuf'a, the rulings of the Prophet, the Companions and the Successors on the authorization of al-shuf'a, conditions and the degrees of priority of pre-emptors.



Partnerships and pre-emption are divided as follows:

I. i. Al-muḍāraba (al-qirād or al-muqāraḍa) (Dormant partnership)

The definition of al-muḍāraba

The word "al-muḍāraba" is synonymous with two other Arabic terms which are used to designate this contract: al-qirād and al-muqāraḍa. These three terms are interchangeable, there being no essential difference in meaning or connotation between them.<sup>1</sup> The divergence in terminology was probably originally due to geographical factors. The terms al-qirād and al-muqāraḍa apparently originated in the Arabian peninsula, especially al-Ḥijāz,<sup>2</sup> while the term al-muḍāraba was of 'Irāqī provenance.<sup>3</sup>

According to al-Sarakhsī, the term al-muḍāraba is derived from the expression 'making a journey' (al-darb fī al-arḍ). This term is used because the agent-manager (al-muḍārib) has the right to claim the profit by virtue

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1. Lis., I, p. 544; Taj., II, p. 251; A.L. Udovitch, EI<sup>2</sup>, vol. 5, 1980, p. 130.

2. Abū Umar Yūsuf b. 'Abd Allāh b. Muḥammad b. 'Abd al-Barr al-Numayrī al-Qurṭubī, Kitāb al-Kāfī fī Fiqh Ahl al-Madīna al-Mālikī, ed. Dr. Muḥammad Muḥammad Aḥīd Walid Mādīk al-Mawrītānī, II (Riyādh, 1398/1978), p. 771; Faiq, II, p. 339; Niha., IV, p. 41; Zur., III, p. 345; Lan., II, p. 2514; UP., p. 174.

3. Zur., III, p. 345.

of his effort and work. Indeed he is regarded as the investor's partner in matters relating to the profit and capital used on the journey and for arrangements or ancillary expenses.<sup>1</sup>

The people of Medina termed this contract al-muqāraḍa (or al-qirāḍ), and that was based on a report concerning 'Uthmān b. 'Affān, who had entrusted funds to a man in the form of a muqāraḍa contract. This is derived from al-qarḍ which signifies cutting; for in this contract the investor cuts off the disposition of this sum of money from himself and transfers its disposition to the agent-manager. It is therefore designated by that name (al-muqāraḍa). The first term (al-muḍāraba) corresponds to that which is found in the Qur'ān:

"While others travel in the land  
(yadrībūna fī al-ard) in search  
of God's bounty,"<sup>2</sup>

that is to say, travel for the purposes of trade or commerce.<sup>3</sup>

In medieval commercial activities profit could be realized only by a combination of capital and trading activity. Consequently al-muḍāraba or al-muqāraḍa, especially for the purposes of long-distance trade,

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1. Mab., XX, pp. 18-19; cf. A.L. Udovitch, EI<sup>2</sup>, vol. V, p. 129-30.
  2. Q., 73:20.
  3. Mab., XXII, p. 18; cf. Zur., III, p. 345. See also Kas., VI, p. 79.

became an ideal instrument for the purposes of obtaining a profitable contract.<sup>1</sup> This type of contract was therefore widely recognized and practised in pre-Islamic times and afterwards.

In general, al-muḍāraba or al-muqāraḍa<sup>2</sup> denotes a fiducial contract or an arrangement whereby an investor (rabb al-māl, in the West commendator) or group of investors (arbāb al-māl) entrusts capital or merchandise to an agent-manager (ʿāmil, muḍārib, in the West tractator). He works with it and then, without delay, returns to the investor(s) the principal and a previously agreed upon share of the profits.<sup>3</sup> As a reward for his labour, the agent receives the remaining share of the profits. Any loss resulting from the exigencies of travel or from an unsuccessful business venture is borne exclusively by the investor(s); the agent is in no way liable for a loss

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1. A.L. Udovitch, EI<sup>2</sup>, vol. V, p. 130.

2. According to Mālik, in the qirāḍ there is neither sale nor lease, nor operarum locatio (ʿamal), nor loan (or sale by advance), nor is there a case of good neighbourly behaviour, which could permit either of the two contracting parties to introduce clauses to his own advantage, regardless of the interests of the other party to the contract. According to Mālik, if any such element is apparent in the qirāḍ contract, it becomes 'hire' (al-ijāra) and hire is only good on known and fixed terms. See Muw. Y., p. 578.

3. Cf. Niha., III, p. 79; Taj., I, p. 349.



of this nature, losing only his expended time and effort.<sup>1</sup> However, should the investor(s) die the contract is dissolved upon the death, and the capital becomes heritable property.<sup>2</sup> This injunction is understood from the Prophet's Tradition: "Your blood and your property are sacrosanct."<sup>3</sup> A contract is also dissolved, if the agent dies.<sup>4</sup> In this case, it was stated in the Qur'ān that:

"Every soul draws the meed of its acts  
on none but itself."<sup>5</sup>

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1. A. Gaiani, "The Juridical Nature of the Moslem Qirād", East and West, 4 (July, 1953), p. 81; UP., p. 170; A.L. Udovitch, EI<sup>2</sup>, vol. V, p. 129. According to Mālik, the recognized and permitted form of al-qirād is that a man takes capital from an associate to use. He does not guarantee it and in travelling uses part of the capital to pay for food and clothes and what he makes good use of, according to the amount of capital. That is, his travelling is a form of work which should be paid for out of the capital. If he remains with his people, he does not have the right to pay for expenses or clothing from the capital. See Muw. Y., p. 575. According to Coulson, the vast majority of Muslim jurists classified al-mudāraba as a type of hire. See C. Com., p. 24.
  2. Haz. M., VIII, p. 249.
  3. IH., IV, p. 185.
  4. Haz. M., VIII, p. 249.
  5. Q., 6:164.

Al-muḍāraba (al-qirāḍ or al-muqārada) and accomendacio  
or commenda in medieval Europe

According to Gaiani, it may be suggested that some of the historical and political reasons might have enabled this oriental institution of al-qirāḍ or al-muḍāraba to have certain influence on the new Mediterranean or Western contract of accomendacio of the jus commune.<sup>1</sup> Udovitch added that it is most likely that the contract of al-qirāḍ or al-muḍāraba, i.e. the commenda in the West, was introduced into Europe, especially Southern Europe through the Italian seaports of the late tenth and early eleventh centuries of the Christian era.<sup>2</sup> It seems that the contract of commenda was an institution indigenous to the Arabian peninsula. This contract developed in the context of the pre-Islamic Arabian caravan trade. Its practice spread to the Near East, North Africa and subsequently to Southern Europe during the times of the Muslim conquests.<sup>3</sup> The two contracts

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1. A. Gaiani, op. cit., pp. 81 and 86. Such an influence on accomendacio was acknowledged by J. Schacht. See 'Law and Justice', in The Cambridge History of Islam, 2B ed. P.M. Holt et al (Cambridge, 1970), p. 562.
  2. A.L. Udovitch, "At the Origins of the Western Commenda : Islam, Israel, Byzantium?" Speculum, 37 (no. 4) (Massachusetts, 1962), p. 207; UP., pp. 171-72; A.L. Udovitch, EI<sup>2</sup>, vol. V, p. 129.
  3. Ibid.

or institutions have the similar main outlines of the structural features and the parallelism of the juridical nature.<sup>1</sup> To support the above propositions, such similarities and parallelisms may indicate that al-mudārabā had certain influence on accomendacio or commenda, or the latter came from the same root, i.e. the oriental mudārabā.

Al-mudārabā (al-qirād or al-muqāraḍa) and its origin in pre-Islamic times

It seems very likely that al-mudārabā (al-qirād or al-muqāraḍa) was an institution indigenous to the Arabian peninsula and other Arab countries. With the Muslim

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1. A. Gaiani, op. cit., pp. 81-86; UP., p. 170 et seq. But Prof. John H. Pryor concluded that "there is direct evidence of influence on the commenda by Byzantium's chreokoinōnia only, although both the Jewish 'isqa and Muslim qirād displayed characteristics which strikingly parallel those of the commenda and which strongly suggest influence." According to him, "the similarities both in economic structure and juridical conception between the qirād and commenda were far too striking for us not to admit that the qirād must have added its influence in those areas of parallelism." See John H. Pryor, 'The Origins of the Commenda Contract', Speculum, 52 (Massachusetts, 1977), pp. 36-37.



conquests, it spread to other countries in the East and the West. Although not mentioned in the Qur'ān, numerous Traditions attribute its practice to the Prophet, before his prophethood.<sup>1</sup> According to Ibn Ishāq, in Mecca, Khadīja bint Khuwaylid was a merchant woman of dignity and wealth. She used to hire men to carry merchandise outside the country on a profit-sharing basis (al-muḍāraba, al-qirāḍ or al-muqārada).<sup>2</sup> According to him, when Khadīja heard about the Prophet's truthfulness, trustworthiness and honourable character, she sent for him and proposed that he should take her goods to Syria and trade with them. When he brought Khadīja her goods she sold and it amounted to double or thereabouts.<sup>3</sup> The Prophet, prior to his early prophethood had acted as an agent in a muḍāraba contract with an investment provided by Khadīja, his wife-to-be.<sup>4</sup> From this evidence it appears that this form of commercial association was popularly practised in pre-Islamic trade between the Quraysh and other tribes,<sup>5</sup> and continued to be practised throughout the early centuries of the Islamic era as the mainstay of caravan

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1. UP., p. 172.

2. IH., I, p. 171.

3. Ibid., pp. 171-72.

4. Ibid.; T. Ta., II, p. 280.

5. Cf. Haz. I., II, p. 95.

and long-distance trade.<sup>1</sup>

### Characteristics of pre-Islamic muḍāraba

The pre-Islamic institution of al-muḍāraba had two characteristic features. First, the possibility of the bilateral contribution of capital; and secondly greater liberty left to the parties in the contract. Prior to the advent of Islam, the form of association in al-muḍāraba where both parties contributed capital was well recognized. This type of association was more extensively practised than the contract where one of the partners only contributed the capital. Islamic law, however, forbade the former contract since there existed in it the element of illegal enrichment, while the law, besides that, required equivalence between the advantages the various parties to the contract hoped for and gained and the identity of services or works rendered and executed by both parties. Further, in the pre-Islamic muḍāraba contract, there had been much greater freedom in drawing up the agreements about division of the profit, regardless of any gains, including usury. Money was not the only nor even the

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1. Ṣāliḥ al-‘Alī, Al-tanzīmāt Al-ijtimā‘iyya wa Al-iqtiṣādiyya fī Al-Baṣra fī Al-qarn Al-awwal Al-hijrī (Baghdād, 1953), pp. 242-43; ‘Abd al-‘Azīz Al-dūrī, Tārīkh Al-‘Irāq Al-iqtiṣādī fī Al-qarn Al-rābi‘ Al-hijrī (Baghdād, 1948), pp. 121 ff.

principal object of the institution. The essential function of al-muḍāraba or al-qirāḍ was to act as a means of promoting the exchange of local products and those in transit and the real object of relations of that type must have been merchandise or commercial goods.<sup>1</sup>

Al-muḍāraba (al-qirāḍ or al-muqārada) during the time of the Prophet

There were several Traditions from the Prophet which demonstrated his approval of this type of contract. The Traditions attributed to the Prophet are an unequivocal endorsement and approval of those engaging in trade by means of al-muḍāraba as follows:

‘Abd Allāh b. Mas‘ūd, a prominent Companion of the Prophet, and al-‘Abbās b. ‘Abd al-Muṭṭalib, the uncle of the Prophet, engaged in muḍāraba contract. The latter having obtained the Prophet's approval for the conditions he imposed upon his agent to whom he entrusted his money.<sup>2</sup> Further, according to al-Kāsānī, the practice of al-muḍāraba was carried

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1. A. Gaiani, op. cit., p. 83.
  2. Muḥammad b. al-Ḥasan al-Shaybānī, Kitāb Al-aṣl, Kitāb Al-muḍāraba, manuscript Dār Al-kutub Al-miṣriyya. Fiqh Ḥanafī, fol. 42a. These conditions were, first, the agent would not take the merchandise on a sea-voyage. Secondly, he would not alight in a stream-bed and thirdly, he would not make a transaction involving livestock. See Mab., XX, p. 18.



out by the Companions,<sup>1</sup> but no disapproval was ever stated by the Prophet.<sup>2</sup> This seems to indicate that he permitted such practices, this permission amounting to his acknowledgment of the legality of al-muḍāraba. Therefore, it is permissible.<sup>3</sup>

The above Traditions showed that the Prophet approved of engagement in trade in the form of al-muḍāraba.

The proportional division of profits

In a contract, the conditions concerning the proportion of the share of profits to be divided between the parties should be agreed upon. Juridical precedent for these conditions was reported by Ibn Ishāq. According to him, Khadīja proposed to the Prophet, before his prophethood, that he should take her goods to Syria (al-Shām) and trade with them. She agreed that she would pay him more than she paid others.<sup>4</sup> This shows that the profits in muḍāraba transactions were divided between the investor(s) and the agent-manager in accordance with what had been agreed upon by both parties at a specific point in time. This action was later conventionally recognized and followed in the case of muḍāraba transactions.

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1. Kas., VI, p. 79.

2. Haz. I., II, p. 95.

3. Kas., VI, p. 79.

4. IH., I, p. 172.

## The Companions

The practice of al-muḍāraba was continued by the Companions. The following examples show their approval of al-muḍāraba:

a. 'Umar b. al-Khaṭṭāb, the Caliph, made a contract of al-qirād (al-muḍāraba) with his sons, 'Abd Allāh and 'Ubayd Allāh, by taking the principal or capital and a half of the profit and giving them the other half of the profit.<sup>1</sup>

b. 'Uthmān b. 'Affān used to provide some money to his agent-manager (al-muḍārib) in a qirād transaction and shared the profit between them.<sup>2</sup>

The above practices of al-muḍāraba are considered to be among the earliest in Islam.<sup>3</sup>

c. 'Umar b. al-Khaṭṭāb,<sup>4</sup> 'Ā'isha<sup>5</sup> and 'Abd Allāh b. Mas'ūd<sup>6</sup> invested the properties of orphans in business to avoid al-zakāt (alms tax) consuming them. They traded these properties in the form of muḍāraba transactions.<sup>7</sup>

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1. Muw. Y., pp. 574-75; Um., IV, pp. 34-35.

2. Muw. Y., p. 575.

3. Zur., III, p. 346.

4. J. Ma., II, p. 59; Ath., p. 160 (no. 732). He also encouraged it. See Muw. Y., p. 202.

5. Muw. Y., p. 202.

6. Mab., XI, p. 176; Zur., III, p. 347.

7. Muw. Y., p. 202; Mab., XI, p. 176; Zur., III, p. 347.

‘Uthmān b. ‘Affān and ‘Alī b. Abī Ṭālib<sup>1</sup> also traded in the property of orphans according to mudārabā transaction. Beside that, ‘Uthmān b. ‘Affān and ‘Abd Allāh b. Mas‘ūd also traded their own properties in mudārabā transaction.<sup>2</sup>

The above accounts show that the Companions continued the practice of al-mudārabā.

The conditions for al-mudārabā

- a. ‘Alī b. Abī Ṭālib emphasized that all losses must be paid for out of the capital.<sup>3</sup>
- b. If the profits are to be divided equally, in accordance with the agreement between the two parties, no losses will be charged to the agent-manager (al-mudārib). This was the opinion of ‘Alī b. Abī Ṭālib.<sup>4</sup>
- c. According to Abū Hurayra, if the investor (rabb al-māl) stipulates the condition that the agent-manager should not alight in a river or stream-bed (baṭn wād) and then the latter alights in such a place thus causing damages to the capital or merchandise, he is liable to its replacement.<sup>5</sup>

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1. Kas., VI, p. 79.
2. Ikhtilaf, pp. 32-33.
3. San., VIII, p. 248.
4. Ibid., pp. 253.
5. Ibid., pp. 253-54.



The proportional division of profits

a. 'Alī b. Abī Ṭālib was of the opinion that the proportional division of profit should be arranged in accordance with what has been agreed by the two parties in the contract (al-ribh 'alā māṣṭalaḥā 'alayh).<sup>1</sup>

In the practice of al-muḍāraba, the Companions followed exactly the previous practice of the Prophet, but they extended new legal conditions to regularize the management of al-muḍāraba.

The Successors

The Successors extended their approval of the practice of al-muḍāraba. Evidence for their approval of al-muḍāraba was demonstrated when Qatāda gave his rulings that all maintenance in a muḍāraba contract should be deducted from the capital; the profits were to be divided as had been agreed upon proportionally; and the loss would be deducted from the capital.<sup>2</sup>

Maintenance of al-muḍārib (the agent-manager) and loss

i. Ibrāhīm al-Nakha'ī, al-Ḥasan al-Baṣrī<sup>3</sup> and al-Qāsim  
b. Muḥammad<sup>4</sup> were of the opinion that the maintenance of

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1. Haz. M., VIII, p. 126.

2. San., VIII, p. 247.

3. San., VIII, pp. 247-48; Haz. M., VIII, p. 248.

4. Mud., V, p. 93.

al-muḍārib and his work were to be taken from the capital in a degree that is just and reasonable. It was agreed by Qatāda that such maintenance was to be taken from the capital.<sup>1</sup> But Ibrāhīm added that the clothing of al-muḍārib was also to be taken from the capital.<sup>2</sup> However, Muḥammad b. Sīrīn considered such maintenance to be a loan and that al-muḍārib should repay it.<sup>3</sup> It is possible to suggest that Muḥammad b. Sīrīn attempted to lessen the liability or responsibility of the investor (ṣāhib al-māl).

ii. Qatāda, Muḥammad b. Sīrīn and al-Sha'bī made their ruling that the loss was to be deducted from the capital and the profit would be divided in accordance with the agreement between the parties.<sup>4</sup> However, the profit cannot be taken by al-muḍārib till it has been calculated and audited by the investor. This was the opinion of Qatāda.<sup>5</sup> According to Ibrāhīm al-Nakha'ī, al-muḍārib should not be forced to pay the profit immediately, without giving him time.<sup>6</sup> According to Hammād, if the

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1. San., VIII, pp. 247 and 250.

2. Ibid.

3. Ibid., p. 247; Haz. M., VIII, p. 248.

4. San., VIII, pp. 247-49.

5. Ibid., p. 248.

6. Huj., III, p. 35.

payment of al-zakāt was not stipulated, in a condition, such payment was to be charged on the investor.<sup>1</sup>

Al-muḍāraba with merchandise

Ibrāhīm al-Nakha'ī disapproved of dry goods, such as cloth and linen, as the capital in al-muḍāraba.<sup>2</sup> The capital should be gold and silver. This was agreed by Hammād. This was also held by al-Ḥasan al-Baṣrī and Muḥammad b. Sīrīn.<sup>3</sup> But Sufyān al-Thawrī permitted such capital in the contract. Ibrāhīm al-Nakha'ī<sup>4</sup> and Muḥammad b. Sīrīn disapproved of giving the merchandise as a loan and the latter further disapproved of fixing a given time for buying it, for fear that al-muḍārib might sell other goods instead. However, if such a contract has been made once, the profit is divided between the parties and the capital is returned to the investor. The latter may give his capital later to al-muḍārib for another contract.<sup>5</sup>

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1. San., VIII, p. 249.
  2. Mud., V, p. 87; San., VIII, p. 250.
  3. Mud., V, p. 87.
  4. Huj., III, p. 35.
  5. San., VIII, p. 250.



Dispute between the parties in al-muḍāraba

i. Muḥammad b. Sīrīn and al-Ḥasan al-Baṣrī were of the opinion that, in the case of capital being destroyed or lost and the investor not having calculated this until he has made another contract, and this second contract gains some profits, al-muḍārīb has no right to the profits until the investor has recovered his capital. But if the first contract has been calculated or the investor has recompensed al-muḍārīb and then he makes a second contract and divides the profits, the loss involved in the first contract should be deducted from the capital.<sup>1</sup> According to al-Thawrī, if al-muḍārīb claims that he has brought the profits, with the capital, without any evidence, the statement or testimony of the investor who claims that al-muḍārīb has not yet returned the capital is accepted and the latter is entitled to recover his capital, except if al-muḍārīb is able to bring evidence in support of his claim. In the latter case, the claim of al-muḍārīb will be accepted.<sup>2</sup> Al-Thawrī added that claims for a proportion of the agreed profits are to be treated in the same manner. But, if there is no condition for the division of profit, then the fair wage or the adequate payment or profits (ajr al-mithl) should be divided between them.<sup>3</sup>

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1. San., VIII, p. 251.

2. San., VIII, p. 251; cf. Haz. M., VIII, p. 249.

3. San., VIII, p. 252.

ii. The claim of breach of contract and of being afflicted by a disaster by the investor and al-muḍārib respectively is not accepted until either of them has produced some evidence. This was the ruling of Shurayḥ.<sup>1</sup>

Transgression, transgredi, or violation of the contract of al-muḍārabā

i. Muḥammad b. Sīrīn, Ṭāwūs, Ma'mar b. Rāshid, Ibrāhīm al-Nakha'ī, al-Sha'bī, al-Ḥasan al-Baṣrī,<sup>2</sup> and the Seven Jurists of Medina<sup>3</sup> were of the opinion that if al-muḍārib transgresses the contract, he is liable to pay or replace the capital to the investor. In this case, Ṭāwūs and Ma'mar added that the profit is to be settled as agreed upon by the parties.<sup>4</sup> Ibrāhīm al-Nakha'ī considered that liability for repayment or replacement falls on al-muḍārib, because he has been trusted to carry out the work.<sup>5</sup> According to him, in this case, neither of the parties has the right of retaining the profit from the work.<sup>6</sup> This was agreed by Ḥammād.<sup>7</sup> Perhaps by giving the above ruling, Ibrāhīm al-Nakha'ī tried to avoid

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1. San., VIII, p. 252.

2. Ibid., pp. 252-53 and 255

3. Mud., V, p. 116.

4. San. VIII, p. 252.

5. Ibid., p. 253.

6. Ibid., p. 255.

7. Ibid., p. 253.

further disagreement between the parties. But if the investor set such conditions as that al-muḍārib should not make a transaction involving certain conditions and then the latter did not follow the instruction for the best interest and benefit of muḍāraba transaction, he would not be liable to any repayment or replacement of the capital.<sup>1</sup> However, Qatāda and al-Ḥasan al-Baṣrī were of the opinion that if al-muḍārib mixes the capital with other property, without the knowledge of the investor, the former is not liable for all damages of the property and if there are profits they will be divided in accordance with the share which has been invested in it.<sup>2</sup> Al-Ḥasan al-Baṣrī regarded al-muḍārib as a confidant (mu'taman) and if he transgresses he will be put at the investor's disposal. But, if the investor values rectitude and probity, he may claim no liability from al-muḍārib.<sup>3</sup> But according to 'Aṭā' b. Abī Rabāh, if al-muḍārib acted in a different way than what the investor had instructed him to do in the contract, the former was liable to pay the capital in any case of damage. If there are any profits they must be divided between the parties.<sup>4</sup>

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1. San., VIII, p. 253.
  2. Ibid., p. 254.
  3. Ibid., p. 255.
  4. Mud., V, pp. 117-18.



The loss and destruction of capital in al-muḍāraba

i. Ma'mar b. Rāshid was of the opinion that both al-muḍārib and the investor are liable to pay the debt of destroyed property in al-muḍāraba, when they bought it on credit. But if the destroyed property has been bought for cash, the investor alone will be responsible.<sup>1</sup> According to al-Zuhrī, the investor is also responsible, if a theft of the muḍāraba's property happens. But if the property has been bought on credit, the buyer will be responsible.<sup>2</sup> However, al-Thawrī was, in this case, of the opinion that both parties are responsible.<sup>3</sup>

The capital and the division of profit

Muḥammad b. Sīrīn permitted conditions set by the investor to the effect that al-muḍārib has to return the profit in the form of goods. Further, Muḥammad b. Sīrīn disapproved of al-muḍārib buying any goods as new capital from the investor, with the dividends being given by the latter. But he permitted the investor purchasing the new capital from al-muḍārib on credit.<sup>4</sup> Hence, Ibrāhīm al-Nakha'ī disapproved of any condition made that the investor should give some capital by cash, some on credit and some in the form of goods. But such practice

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1. San., VIII, p. 256.

2. Ibid.

3. Ibid.

4. Ibid., p. 257.

is permissible, when it is made without any prior condition.<sup>1</sup> Tāwūs also disapproved of such practice.<sup>2</sup> It may be suggested that the purpose of such disapproval was to avoid any further exploitation by the investor. Al-Thawrī was of the opinion that any condition can be made on proportional profits or dividends between the parties, such as one-third, one-fourth or whatever they agree.<sup>3</sup> According to him, any new agreement should be dealt with separately, even if the capital and the proportional profit is agreed on the same basis.<sup>4</sup> After the death of the investor, the capital will be returned to the legatee or heir (al-mūṣā lah) and the executor (al-mūṣā ilayh), in accordance with the testamentary disposition made by the testator (al-mūṣ) or the deceased. This view was held by al-Sha'bī.<sup>5</sup>

ii. Quasi-muḍāraba transactions:

The following contracts appeared to be semi-muḍāraba, because of the existence of some of its features and characteristics in them and their similarities. They are

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1. San., VIII, p. 257.
  2. Ibid.
  3. Ibid.
  4. Ibid., pp. 257-58.
  5. Ibid., p. 258. This means that al-muḍāraba belongs to the category of contracts of licence, under English law, which is terminated by the unilateral rescission of either party, or by his death, lunacy or interdiction on the ground of prodigality (or incompetency). See C. Com, p. 76.

three forms of sale which have as their starting point the cost of the sale's object to the vendor. According to Coulson, these three transactions are best described as the particular "uberrimae fidei, or fullest confident" contracts of Islamic legal system.<sup>1</sup> These contracts are:

1. Bay' al-murābaḥa (Partnership between investors and borrowers in profit-sharing re-sales or resale at a stated surcharge on the stated original cost which represents the profit)

The definition and the pre-Islamic origin of al-murābaḥa

Bay' al-murābaḥa is the re-sale at specified surcharge or rate of profit on the stated original cost.<sup>2</sup> According to Udovitch, it may be speculated that its use was limited to a particular circumstance. For instance, a purchaser may have been willing to pay a retailer who was at hand a specified surcharge on the cost of certain goods in order to prevent himself from any trouble of buying them from a wholesaler. It may also serve as a form of commission sale, when the purchaser is permitted to obtain commodities on credit and resell them with the surcharge of either a fixed price or a fixed rate of profit based on the original price.<sup>3</sup> This type of sale was normally practised in pre-Islamic times.<sup>4</sup>

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1. C. Com., pp. 72-73.

2. UP., pp. 219-20.

3. Ibid., pp. 221-22

4. Muf., VII, p. 398.



### The Companions

This type of transaction was not mentioned by the Prophet and he did not say whether it was permitted or not. But some of the Companions initiated a discussion about bay' al-murābaḥa. Basically partnership between investors and borrowers in profit-sharing re-sales was allowed by the Companions. But 'Abd Allāh b. Mas'ūd disliked the idea of taking profits by putting a high price on goods to cover the cost of maintaining them.<sup>1</sup> Bay' al-murābaḥa means that an investor is not reckoned to be entitled to the wage of an agent, or any allowance for such things as ironing, folding or straightening cloth, for other expenses or for the rent of a warehouse. According to Mālik the cost of transporting drapery should be included in the basic price, and should not be allocated to the share of the profit, unless the agent makes all this clear to the investor from the beginning. If knowing the facts they agree to share the profits accordingly then there is no harm in that.<sup>2</sup> Further, Jābir b. 'Abd Allāh prohibited a man to sell foodstuffs which are not with him and then buy them after selling them on the owner's behalf, while he knows the price of the market and he knows they are profitable.<sup>3</sup>

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1. San., VIII, p. 231.

2. Muw. Y., pp. 556-57.

3. Mud., IV, p. 231.

### The Successors

Al-Thawrī was of the opinion that the borrowers could not return or reimburse any goods, which they had bought, in murābaḥa transaction,<sup>1</sup> before the agreed term had been resolved between him and the investors. According to him, if the contracted goods belonged to two investors the profits would be shared in accordance with the different amounts of capital they had invested.<sup>2</sup> In addition, according to al-Sha'bī, if the contract of al-murābaḥa was agreed on an equal term the profits would be divided equally between the two investors, and the capital would be provided by both parties. This was the case provided the parties ran the business collectively. This view was also approved of by al-Thawrī.<sup>3</sup> However, if the business was run individually, the profits would be divided equally between the parties. This was held by al-Ḥakam b. 'Uṭayba. But al-Sha'bi opined that the profits, in this case, should be divided in accordance with the capital which had been invested by the parties.<sup>4</sup>

According to Muḥammad b. Sīrīn, if a man bought some goods on credit, and then sold them on the basis of al-murābaḥa, and the first vendor later discovered it, then he was entitled to claim the profit or otherwise. However,

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1. San., VIII, p. 299.
  2. Ibid., p. 229.
  3. Ibid.
  4. Ibid.

if the goods had been consumed he had to pay cash.<sup>1</sup> This was agreed by Shurayh.<sup>2</sup> Muḥammad b. Sīrīn condoned such sales if they were already known or agreed by the investors.<sup>3</sup> But, according to Qatāda, if the purchaser concealed that he was dealing with a murābaḥa transaction and he bought the goods on credit, it would be considered as though he had bought the goods on credit.<sup>4</sup> It is not allowed for a man to sell foodstuffs which are not with him and then buy them after selling them on the owner's behalf, while he knows the price of the market and he also knows they are profitable, unless he buys foodstuffs which are not with him, with a guaranteed deferment or delay of delivery, when they arrive at the market or he does not know the condition of the goods and their price in the market and whether they are profitable or not. This was held by Sa'īd b. al-Musayyib, Ṭāwūs and 'Atā' b. Abī Rabāḥ.<sup>5</sup>

According to al-Thawrī, the investors could take the profits from murābaḥa transactions in any currency.<sup>6</sup> But Muḥammad b. Sīrīn disapproved of replacing the currency which they had invested at the beginning of transaction

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1. San., VIII, p. 230.

2. Ibid.

3. Ibid., pp. 230-31.

4. Ibid., p. 231.

5. Mud., IV, p. 231.

6. San., VIII, p. 231.



with any less valuable currency.<sup>1</sup> Al-Thawrī was also of the opinion that if many borrowers were involved, the transactions had to be made in murābaḥa altogether or in full.<sup>2</sup> Qatāda and Sa'īd b. al-Musayyib were of the opinion that the maintenance of goods could not be charged as profits.<sup>3</sup> But Ibrāhīm al-Nakha'ī allowed such practices,<sup>4</sup> perhaps to cover all expenses. According to al-Thawrī, the profits made through maintenance of goods were for the purpose of payment of employees who worked to look after the goods.<sup>5</sup>

Bay' al-raqm (Sale by number)

Only the Successors made some rulings on this sale. Bay' al-raqm (Sale by number) is related to bay' al-murābaḥa. This type of sale was normally made in the form of murabaha transaction. Among the Successors Muḥammad b. Sīrīn who disapproved of bay' al-raqm, in cases where an investor said to a borrower: "Give me from the profits by adding numbers (of goods), i.e. after gaining or obtaining such profits." However, there was no harm if the investor said: "Add (goods from the profits which were gained) by numbering (them) such and

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1. San., VIII, p. 231.

2. Ibid.

3. Ibid., pp. 231-32.

4. Ibid., p. 232.

5. Ibid.

such (i.e. by adding the numbers (the profits) to a specified amount from the profit, in accordance with the capital given).<sup>1</sup> Ṭāwūs considered this transaction as fraudulence.<sup>2</sup> Ibrāhīm al-Nakha'ī, nevertheless, approved of such sales, as long as the investor and the borrower saw and opened or unfolded the goods by themselves. An example of such a transaction was when a borrower purchased cloth by counting its amount then including into the amount of cloth the cost of hiring and other expenses. He later sold the cloth on the basis of murābaḥa transaction. This transaction, i.e. bay' al-raqm, was considered lawful on condition that the goods were seen and inspected by both parties.<sup>3</sup> According to al-Shaybānī, the investor has the right of option after he knows the number of goods and profits, if he wishes he could take or leave them.<sup>4</sup>

2. Bay' al-tawliya or al-tawliya fī al-bay' (Re-sale at the stated original cost with no profit or loss to the seller)

The definition of bay' al-tawliya, its origin in pre-Islamic times and the Prophet

Bay' al-tawliya is a contract of resale at the fixed original cost with no profit or loss to the vendor.

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1. San., VIII, p. 233.

2. Ibid., p. 234.

3. Ibid., pp. 233-34.

4. Asl., pt. I, vol. I, p. 174 (40)

According to al-Kāsānī, this contract is regarded, like bay' al-murābaḥa, as a sale of trustworthiness or reliability; because the purchaser has entrusted the seller to fix the original price without any evidence.<sup>1</sup> This contract was commonly practised in pre-Islamic times.<sup>2</sup> According to al-Shāfi'ī, the status of al-tawliya and al-sharika is the same status as sale in regard of its conditions of permissions and prohibitions.<sup>3</sup> The Prophet is reported to have permitted the transaction by the means of al-tawliya.<sup>4</sup> He is reported to have said:

"Whoever purchases foodstuffs, should not sell them until he has taken possession of and accepted them, except if the purchaser has shared in them (al-sharika), resold them at cost price (al-tawliya) or rescinded the sale voluntarily (al-iqāla)."<sup>5</sup>

#### The Companions and the Successors

No discussion on al-tawliya by the Companions was reported.

Of the Successors, al-Ḥasan al-Baṣrī, al-Sha'bī, Muḥammad b. Sīrīn,<sup>6</sup> Ṭāwūs, Qatāda and al-Thawrī all held the same view that al-tawliya in a sale was lawful and

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1. Kas., V, p. 223.

2. Muf., VII, p. 398.

3. Um., III, p. 93.

4. San., VIII, p. 49.

5. Ibid.

6. Huj., II, pp. 708-10.



its validity was generally accepted.<sup>1</sup> According to al-Zuhrī, al-tawliya is a sale, whether of food or other commodities.<sup>2</sup> Further, Muḥammad b. Sīrīn and al-Ḥasan al-Baṣrī added that the goods must be measured or weighed before the contract.<sup>3</sup> Muḥammad b. Sīrīn added in al-tawliya, the goods must also be possessed before the contract.<sup>4</sup>

3. Bay' al-waḍī'a (Resale at a discount from the original cost)

Neither the Prophet nor the Companions made any further statement or ruling on this pre-Islamic transaction.<sup>5</sup> But the Successors regularized this contract. However, they ruled that it is not permissible to purchase any goods at a discount from the original costs (bay' al-waḍī'a), after they have already been sold, but before they were paid for. This was held by Ma'mar b. Rāshid, Ṭāwūs and Ḥammād.<sup>6</sup>

The main purpose of the above contracts, especially of murābaḥa and tawliya sales, was the protection of the unskilled general consumers lacking expertise and skill

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1. San., VIII, pp. 48-49.

2. Ibid., p. 48.

3. Ibid., p. 49.

4. Ibid.

5. Muf., VII, p. 398.

6. San., VIII, p. 186.

in the various kinds of goods or commodities from the wiles and stratagems of shrewd businessmen.<sup>1</sup> In these contracts, the purchaser is under a necessity of placing absolute confidence in the word of the seller, who is skilful in the business. Therefore, it is incumbent on the seller to be just and true to his word and to abstain from any fraud or semblance.<sup>2</sup> After basing the sale's price on the original cost of the goods to the seller, the purchaser is provided with a modicum of protection against unjust exploitation by unscrupulous merchants.<sup>3</sup>

iii. Three other kinds of quasi-muḍāraba contracts:

1. Al-samsara (Brokerage)

Its definition, origin and practice before Islam

Al-simsār (plural al-samāsira) is a middleman or intermediary between a vendor and a purchaser in the execution of a sale,<sup>4</sup> or a broker who acts as an intermediary between the seller and the purchaser.<sup>5</sup> He was also known as al-dallāl.<sup>6</sup> Al-simsār, arabicized from Persian,<sup>7</sup> means a well-versed, skilful person.<sup>8</sup> The traders had been called al-samāsira (the

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1. Al-Marghinānī, Al-Hidāya, III (Cairo, n.d.), p. 56.
  2. Cf. Kas. V, p. 223.
  3. UP., p. 220.
  4. Lis., IV, pp. 380-81.
  5. Lan., I, p. 1426.
  6. Ibid.; Muf., VII, p. 413.
  7. Muf., VII, p. 413.
  8. Taj., III, p. 280.

brokers) in pre-Islamic times<sup>1</sup> but the Prophet called them al-tujjār (the traders or merchants).<sup>2</sup> In pre-Islamic times, the contract of al-samsara (brokerage) was commonly made between a townsman and an inhabitant of the desert.<sup>3</sup> It was widely practised in all aspects of business transaction.<sup>4</sup> According to Schacht, the term sensalis (sensale, sensal), in Europe, was derived from the Arabic word simsār (broker).<sup>5</sup>

### The Companions

No ruling was made by the Prophet. But the Companions made some rulings on this subject.

During the time of the Companions and the Successors, this type of sale was also known as bay' al-qīma (the sale of real value of goods; the sale of non-fungible goods).<sup>6</sup> This contract applies when an owner of capital says to the broker: "Sell this (commodity) at such and such a price and anything above that is yours." 'Abd Allāh b. 'Abbās was of the opinion that there was no harm in such a sale.<sup>7</sup> However, he disallowed the broker to buy goods on credit, while the owner of capital ordered him to buy them in cash.<sup>8</sup>

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1. Lis., IV, pp. 380-81.

2. J. Ma., II, p. 5; Taj., VII, p. 167.

3. Supra chapter II, pp. 79-84.

4. Muf., VII, p. 414.

5. Intro., p. 78.

6. San., VIII, p. 234.

7. Ibid.

8. Ibid., p. 236.



### The Successors

The definition of this sale is that a capitalist asks his broker to sell certain goods at a certain price and tells him that whatever profit he gains more than that is his own. Qatāda, Muḥammad b. Sīrīn, al-Sha'bī, 'Aṭā' b. Abī Rabāḥ, al-Ḥasan al-Baṣrī<sup>1</sup> and Shurayḥ<sup>2</sup> considered that such sales were not invalid and that there was no harm in them. Ibrāhīm al-Nakha'ī,<sup>3</sup> Ṭāwūs and al-Ḥasan al-Baṣrī,<sup>4</sup> however, disapproved of such sales. It can be suggested that such sales were disapproved of, if they were considered as hiring of service. The person who gave his capital was the hirer and the hirer should specify the amount of hire or service owed to the broker. But such sales were approved of if they were regarded as sales through the employment of an agent at the latter's disposal.

#### 2. Bay' al-fuḍūlī (The sale by an uncommissioned agent, negotiorum gestor)

The Islamic legal principal may approve the act of an unauthorized agent (fuḍūlī) and thereby make it valid, even though on the principle, the law does not recognize unauthorized agency of a stranger as a source of obligations.<sup>5</sup>

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1. San., VIII, pp. 234-35.
  2. Haz. M., VIII, p. 429.
  3. San., VIII, p. 235.
  4. Haz. M., VIII, p. 429.
  5. Intro., p. 159.

### The Prophet and bay' al-fuḍūlī

The precedent of this sale was the Tradition of the Prophet. It was reported by 'Urwa b. Abī al-Ja'd al-Bāriqī that he had been commissioned by the Prophet to buy an animal for slaughter with a dīnār. Then, he met a man and sold the animal to the man for two dīnārs. Later, 'Urwa bought another animal for a dīnār. He gave to the Prophet the animal and the money and he told the Prophet what he had done...<sup>1</sup> In another Tradition, Ḥakīm b. Hizām reported that he had been commissioned by the Prophet to buy a slaughter animal. He had done the same as 'Urwa had done. The Prophet had given him a dīnār.<sup>2</sup> It seems that this contract was an Islamic origin.

### The Companions

Ḥudhayfa b. al-Yamān commissioned an agent to buy for him two items of his description and paid in advance. The agent did not find any goods corresponding to the description and he later bought two items of lesser quality instead. By buying these two items and reselling them to other people, the agent made a larger profit. Ḥudhayfa ordered his agent to give him back his capital.<sup>3</sup> From this report it appears that the Companions permitted bay' al-fuḍūlī, i.e. the agent was acting lawfully in

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1. Um., III, p. 17; San., VIII, pp. 189-90.

2. San., VIII, p. 190.

3. Ibid., p. 189.

buying goods which were not commissioned by the owner of the capital, if he thought such a purchase or contract would be beneficial to the owner of the capital. This rule had been laid down by the Prophet before them.

### The Successors

If an agent buys goods from any place other than that where he was commissioned, the goods should be given to the person who commissioned him. This was decided by Shurayh.<sup>1</sup> But al-Thawrī said the commissioner had the right of compensation.<sup>2</sup> Qatāda was of the opinion that, if an agent bought certain goods at a price higher than that at which he had been commissioned to purchase, and if they were damaged then the agent had to compensate for them.<sup>3</sup> In this case, Ibrāhīm al-Nakha'ī was of the opinion that if the goods were damaged before they were delivered to the agent, the agent was relieved from any liability. But if they were damaged in the hands of the agent, the commissioner had the option to take them or if he did not want to take them he could claim compensation.<sup>4</sup> Further, according to al-Thawrī if the agent bought goods which were similar to those described by the commissioner and if they became damaged in the hands of the agent, then he would not be liable to pay

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1. San., VIII, p. 188.

2. Ibid., p. 190.

3. Ibid., pp. 188-89.

4. Ibid., p. 190.



any compensation.<sup>1</sup> In addition, if the agent bought the goods at a lower price than that which had been prescribed by the commissioner, the agent was also not liable to any compensation for damages.<sup>2</sup> According to him if the agent bought goods which had been commissioned, but told the commissioner that he had bought them for himself, then the agent had to give the goods to the commissioner, unless the agent had stipulated such an agreement with the vendor at the time of purchase that he had bought them for himself.<sup>3</sup>

3. Agricultural sharecropping (métayage agricole)

There were five types of sharecropping which were practised by the Arabs before the advent of Islam. They were:

- i. Al-muḥāqala<sup>4</sup> (lease of land for food)
- ii. Al-mukhābara (lease of land against a certain part of its produce)
- iii. Al-muzāra'a (lease of "white" or bare land for a certain part of its produce; métayage, sharecropping)

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1. San., VIII, p. 189.

2. Ibid.

3. Ibid., p. 190.

4. Al-muḥāqala also applies to exchange the grain still in the ear which was prohibited by the Prophet, because of its gharar in it. Supra chapter III, pp. 141-42.

- iv. Kirā' al-ard (lease or rent of land, against its produce, a fixed sum of money, or in kind)
- v. Al-musāqāt (lease of a fruit tree, or an orchard for irrigating, fecundating and protecting fruit trees for a certain share of the fruit)

The analysis on these five types of sharecropping are as follows:

- i. Al-muḥāqala or al-ḥaql

Its interpretation, pre-Islamic practice and the Prophet

Al-muḥāqala was a form of landholding (métayage) of the Arabs in pre-Islamic times. In this contract landless tillers or cultivators (métayers) took from individual landlords, tribes or religious institutions, arable lands on the basis of lease against food, grain or corn, in kind or against certain parts of the produce of land. This contract of tenure was commonly practised in the northern and southern parts of the Arabian peninsula.<sup>1</sup>

Al-muḥāqala implies and epitomizes the pre-Islamic custom of leasing land against a certain amount of food-grain. According to 'Abd Allāh b. 'Abbās, al-muḥāqala was the word or it was in the language of al-Anṣār (the Medinans) which meant lease of land.<sup>2</sup> The ancient 'Irāqīs called it "al-qarāḥ"<sup>3</sup> or "al-muzāra'a".<sup>4</sup> The

1. Haq., p. 15.

2. Ah.M., IV, p. 310 (2864); San., VIII, p. 98.

3. Huj., IV, p. 168 (n.2); Umd., XI, p. 298; Lan., I, p. 62.

4. Jawād 'Alī, Tārīkh Al-'Arab Qabl Al-Islām, (Baghdad, 1950-59), VIII, pp. 224-27.

Prophet is reported to have forbidden this type of transaction.<sup>1</sup>

ii. Al-mukhābara or al-khibr

Its interpretation, origin and the Prophet

Two interpretations of al-mukhābara were made by Muslim scholars. First, this term is either derived from khabār (a soft soil)<sup>2</sup> or from the Arabian oasis town of Khaybar. The latter implies the deal between the Muslims and Jews who, after their surrender, made a contract that they would pay half of their produce to the Muslims if they were allowed to stay on their lands. Therefore, this deal means a contract with a person to cultivate land for certain part of its produce, or against a determinate share, like one third, or fourth and the like.<sup>3</sup> With this interpretation al-khibr is synonymous with al-mu'ākara.<sup>4</sup>

Secondly, al-mukhābara means a lease of land for a share of its produce. Such a contract is a form of pre-Islamic and ancient system of land tenure among the Arabs. The term is derived from khubra, meaning a knowledge of wells or agriculture which implies cultivation.<sup>5</sup> To

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1. Ath., p. 189 (858); San., VIII, pp. 95 and 98.

2. Lan., I, p. 696.

3. Lis., IV, p. 225.

4. Majd al-Dīn Muḥammad b. Ya'qūb al-Fīrūzābādī, op. cit., II, p. 17; Lan., I, p. 695.

5. Zur., III, p. 364.



support this interpretation, Ibn Ḥazm<sup>1</sup> and al-Zurqānī<sup>2</sup> do not agree with other scholars who interpret that the meaning of al-mukhābara is derived from Khaybar. The Prophet is reported to have banned such practices.<sup>3</sup>

### iii. Al-muzārā'a

Its definition, pre-Islamic practice and the Prophet

Al-muzārā'a implies a lease of land for a share of some part of its produce, i.e. sharecropping of grain (grain métayage). In this case, the seeds<sup>are</sup> provided by the land's owner.<sup>4</sup> Such a contract was usually practised by the Arabs in pre-Islamic times.<sup>5</sup> The Prophet is reported to have prohibited this contract.<sup>6</sup> In another Tradition, it is reported that the Prophet made the contract of al-mu'āmalā (or of al-musāqāt) and of al-muzārā'a with Khaybarite Jews for a half share of the land's produce.<sup>7</sup> According to Ibn Ḥazm, such a practice by the Prophet was a permission on the basis of social necessity (ḍarūra).<sup>8</sup>

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1. Haz. M., VIII, p. 219.

2. Zur., III, p. 364.

3. J. Ma., II, p. 78; Muw. Sh., p. 295; Han. M., p. 167 (352).

4. Taj., V, p. 368; Lan., I, p. 1226.

5. Muf., VII, p. 217.

6. Haz. M., VIII, p. 219.

7. Ibid., p. 213.

8. Ibid., p. 214.

iv. Kirā' al-ard

Its definition, its pre-Islamic practice and the Prophet

Mālik defines kirā' al-ard as lease of land against wheat from its produce or others.<sup>1</sup> This contract was commonly practised by the Arabs in pre-Islamic times. There were several disagreements which arose out of such tenure because it amounted to an agreement which resulted in an unknown share of produce.<sup>2</sup> The Prophet is reported to have prohibited renting out fields,<sup>3</sup> and he prohibited the contract of kirā' al-mazāri'<sup>4</sup> or kirā' al-ard.<sup>5</sup> In another Tradition, the Prophet is reported to have prohibited such a contract of leasing land against some of its produce but allowed it if it was against gold or silver.<sup>6</sup>

v. Al-musāqat

Its definition, origin in pre-Islamic times and the Prophet

The word al-musāqāt is a verbal noun derived from saqā (s.q.y.), to water, or irrigate a land. It implies that the essential element of the total process of

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1. Muw. Y., p. 603.

2. Muf., VII, pp. 218-19.

3. Muw. Y., p. 602.

4. Ibid.

5. Mud., IV, p. 544; Haz. M., VIII, p. 213.

6. Mud., IV, p. 545.

production was constituted by the method of agriculture irrigation. It forms the major part of the investment and expenditure. Al-musāqāt is valid, even in the case of rain water being available, although there is no need for artificial irrigation. In this case, other expenses take the place of watering (saqy).<sup>1</sup> In other words, the contract of al-musāqāt is the contract of employing a tiller to take upon himself, or manage, or watering and the like, of palm trees or grape-vines or the like on the condition of his having a certain share of their produce. The people of 'Irāq termed this contract as al-mu'āmala.<sup>2</sup> This contract concentrates on sharecropping of fruit (fruit métayage) only. This type of land tenure was widely practised in the former provinces of the Byzantine and Sāsānian Empires.<sup>3</sup> Traditions in relation to al-musāqāt were reported as follows:

i. The Prophet said to the Jews of Khaybar on the day of the conquest of Khaybar:

"I keep you on the land on which God has kept you, on the condition that the fruit will be equally shared between you and us."

Sa'īd b. al-Musayyib says that the Prophet used to send 'Abd Allāh b. Rawāḥah to assess the shares of the Prophet

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1. Zur., III, p. 363.

2. Lan., I, p. 1385.

3. Haq., p. 320.



and the Jews. After the assessment he used to say to them, "If you wish, this share is for you and the other half for us." They used to accept this division.<sup>1</sup>

ii. The Prophet made the contract of al-musāqāt at Khaybar, with half share of the produce.<sup>2</sup>

According to Mālik, the above Tradition showed that the contract of al-musāqāt between the Prophet and the Khaybarites,<sup>3</sup> involved date-palms and they formed al-aṣl (the capital).<sup>4</sup> Further, this contract cannot be analogically deduced to apply as al-ijāra.<sup>5</sup>

iii. In another Tradition, the Prophet leased his land of 'Urba in exchange for certain produce of lands.<sup>6</sup>

It appears that the above five forms of land tenure are similar. Therefore, they will be later referred to as agricultural sharecropping (métayage agricole), to avoid any confusion.

It is possible to conclude that the Prophet forbade the above contracts, which were of an extreme aleatory nature, on two grounds:

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1. Muw. Sh., p. 294; Muw. Y., p. 592.
  2. Mud., V, p. 20.
  3. San., VIII, pp. 97-98.
  4. T. Ikh., p. 129.
  5. Muw. Y., p. 595.
  6. San., VIII, p. 100.

- i. It consisted of foodstuffs which were subjected to fluctuation in market price; and
- ii. the actual value of the portion of lease relied on the quality of the harvest and was unknown at the time the contract was concluded. This contract was fraught with risk and speculation,<sup>1</sup> or gharar.

In spite of his prohibition of these contracts, on another occasion he did not forbid them,<sup>2</sup> and allowed such practices if they were contracted in exchange for gold or silver,<sup>3</sup> or they were made without unjust preconditions.<sup>4</sup> In addition, the Prophet prohibited any contract of sharecropping which caused disagreement between the parties.<sup>5</sup> However, these other Traditions show that, if the Prophet banned them, he never banned lease of land or sharecroppings in an unconditional or categorical way or manner. Al-Shaybānī,<sup>6</sup> al-Shāfī,<sup>7</sup> and Abū Yūsuf<sup>8</sup> validated such contracts. According to al-Zurqānī, the

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1. C. Conf., pp. 70-71.

2. Huj., IV, p. 171; San., VIII, pp. 97-98.

3. Um., IV, p. 26.

4. San., VIII, p. 93.

5. Ibid., p. 97.

6. Muw. Sh., p. 295.

7. Um., IV, p. 11. But he limits al-musāqāt to dates and grapes only, which are easily assessed on the tree.

8. Khar., p. 51.

contract of al-mu'āmalā or al-musāqāt (and a partial muzāra'a) at Khaybar was specially allowed by the Prophet as an exception (mustathnāt) by virtue of social necessity (ḍarūra), as it is a common knowledge that every landowner is not capable of cultivating all his lands or irrigating all his own orchards by himself.<sup>1</sup>

### The Companions

During the time of the Companions the contract of sharecroppings was humanely interpreted and modified to keep up with the demands of circumstances and social needs. It seems that this interpretation was made, after they had come to the conclusion that the Prophet had never prohibited them unconditionally. Moreover, the modification of interpretation was due to the territorial extension of the Muslim community so that the growth of Islamic law would keep pace with changing conditions. Therefore, they regarded such a contract of sharecroppings to be valid.<sup>2</sup> By this time, the five kinds of pre-Islamic tenancies were interpreted to be amalgamated into one.

In general, the Companions ruled that there was no harm if the lease of land (kirā' al-arḍ) was made in exchange for gold or silver or a contract in the form of money-rent. This was held by 'Abd al-Raḥmān b. 'Awf,<sup>3</sup>

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1. Zur., III, p. 365.

2. Haq., pp. 105-06.

3. Muw. Y., pp. 602-03; Um., IV, p. 26.



al-Zubayr b. al-‘Awwām,<sup>1</sup> ‘Abd Allāh b. ‘Abbās,<sup>2</sup> ‘Abd Allāh b. ‘Umar,<sup>3</sup> Anas b. Mālīk,<sup>4</sup> Sa‘d b. Mālīk<sup>5</sup> and Rāfi‘ b. Khadīj.<sup>6</sup> But the latter invalidated such a contract if it was made with unjust preconditions and exception.<sup>7</sup> He categorized the terms of al-muḥāqala<sup>8</sup> and al-mukhābara<sup>9</sup> and their rulings as kirā’ al-arḍ as well. This applies to an uncultivated land, dead, virgin or bare "white" land (al-arḍ al-bayḍā’) only.

Abū Bakr, ‘Umar,<sup>10</sup> ‘Uthmān<sup>11</sup> and ‘Alī<sup>12</sup> ruled that the contract of al-musāqāt with Khaybarite tenants was valid and permissible.<sup>13</sup> Al-muzāra‘a may be subsumed under this contract since ‘Abd Allāh b. ‘Umar reported that the Prophet had made the contract of al-mu‘āmalā (al-musāqāt) and al-muzāra‘a with Khaybarite tenants.<sup>14</sup> In addition, Sa‘d b. Abī Waqqāṣ, ‘Abd Allāh b. Mas‘ūd,<sup>15</sup>

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1. Muw. Y., p. 603; Mud., IV, p. 546.
  2. San., VIII, pp. 91-92.
  3. Muw. Y., p. 602; San., VIII, pp. 91 and 94.
  4. San., VIII, pp. 93-94.
  5. Ibid., p. 94.
  6. Muw. Sh., p. 294; Muw. Y., p. 602; Mud., IV, p. 546.
  7. San., VIII, pp. 92-93.
  8. Ibid., p. 93.
  9. Haz. M., VIII, pp. 221-22.
  10. San., VIII, p. 98.
  11. Khar., p. 51.
  12. San., VIII, p. 99.
  13. Haz. M., VIII, p. 214.
  14. Ibid., pp. 213-14.
  15. Huj., IV, pp. 161-62; Khar., p. 51; San., VIII, p. 99.

with the above four great Companions, Khabbāb b. Aratt, Hudhayfa b. al-Yamān, Mu'ādh b. Jabal,<sup>1</sup> 'Abd Allāh b. 'Umar,<sup>2</sup> Sa'd b. Mālik<sup>3</sup> and the families of Abū Bakr, 'Umar and 'Alī<sup>4</sup> validated and practised such a contract against a third or fourth of the land's produce. Further, 'Umar b. al-Khaṭṭāb used to lease his uncultivated land (al-ard al-juruz) against a third and fourth of its produce.<sup>5</sup> However, such a contract was not valid if it was made with stipulation of unjust preconditions in it. This was held by 'Abd Allāh b. 'Umar.<sup>6</sup> Such unjust preconditions might do injustices to the precarious nature of the tenant and the produce of tenancy.<sup>7</sup> In the sharecropping contracts, there were different combinations of rents paid by tenants depending on the local customs, whether in the term of grain, part of the produce of the land or money-rent, i.e. gold or silver.

Another contract of sharecropping was al-qabāla or al-ḍamān which is the equivalent of locatio in the

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1. Huj., III, p. 117; Haz. M., VIII, pp. 215-16.
  2. Huj., IV, pp. 162-64; San., VIII, p. 101.
  3. Huj., III, pp. 161-62.
  4. San., VIII, p. 101.
  5. Huj., IV, pp. 168-69.
  6. San., VIII, p. 93.
  7. Ibn Ḥazm further disallowed stipulating fixed money-rent to protect any exploitation and injustices to the tenants. See Haz. M., VIII, pp. 226-27.

oriental provinces of the Byzantine Empire.<sup>1</sup> This contract was made either by employing agents (actores) to manage the agricultural estates or by leasing them on short terms to contractors (conductores) who then either cultivated the estates themselves or sublet to the coloni (singular, colonus, cultivator, tiller).<sup>2</sup> A person who undertakes a qabāla contract is called al-mutaqabbil (the conductore) in Islamic law.<sup>3</sup> The contractors pay to the landlord (the procuratore), either an individual or the State, a fixed rent and make their profit in extra levies and dues from the tenants. The contractors were also rent and tax collectors during these times. Their formal duty/<sup>was</sup> also to supervise the estates and the tenants. The contract of al-qabāla was also practised in the Sāsānian Empire.<sup>4</sup> No Tradition by the Prophet had been reported on this matter. But, among the Companions, 'Abd Allāh b. 'Umar and 'Abd Allāh b. 'Abbās declared such a contract as invalid.<sup>5</sup> Such prohibition may be comprehended <sup>was</sup> the qabāla contract caused unjust treatment to the tillers ('ulūj) on the land.

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1. F. Lokkegaard, Islamic Taxation in the Classic Period (Copenhagen, 1950), p. 15; Haq., p. 288.
  2. Haq., p. 288.
  3. Um., IV, p. 14.
  4. Haq., p. 288.
  5. Amw., p. 70.



### The Successors

The majority of the Successors, including Sa'īd b. al-Musayyib,<sup>1</sup> Sālīm b. 'Abd Allāh,<sup>2</sup> Ibrāhīm al-Nakha'ī, Sa'īd b. Jubayr,<sup>3</sup> al-Qāsim b. Muḥammad, 'Urwa b. al-Zubayr, 'Ubayd 'Allāh b. 'Abd Allāh b. 'Umar, 'Umar b. 'Abd al-'Azīz and Rabī'a b. Abī 'Abd al-Raḥmān<sup>4</sup> allowed the practice of leasing the virgin, dead or bare "white" land (al-arḍ al-bayḍā'), i.e. uncultivated land, for gold or silver.<sup>5</sup> This was also held by al-Zuhrī. But he disallowed it against food or produce of land (al-muḥāqala).<sup>6</sup> 'Umar b. 'Abd al-'Azīz allowed such a practice and subsumed al-mukhābara under kirā' al-arḍ.<sup>7</sup> Ibrāhīm al-Nakha'ī added that such a contract should be made at specified time<sup>8</sup> and he and Sa'īd b. Jubayr opined that such a practice should be made with a fixed silver or with a specified weight of grain.<sup>9</sup> However, Tāwūs disallowed a contract of sharecropping if it was made against a specified weight of grain or produce of land.<sup>10</sup>

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1. Muw. Y., p. 602; Um., IV, p. 26; San., VIII, p. 95.
  2. Huj., IV, pp. 171-72.
  3. Huj., IV, pp. 186-88; San., VIII, p. 91.
  4. Mud., IV, p. 546.
  5. San., VIII, pp. 91-92 and 94-95.
  6. Ibid., p. 91.
  7. Ibid., p. 94.
  8. Ibid.
  9. Huj., IV, pp. 186-88.
  10. Ibid., p. 168.

Possibly he considered such specification of produce or grain's weight as one of unjust preconditions which would dissolve or invalidate such a contract of partnership from the beginning and may cause hardships to the partners.

Some of the Successors saw no harm in such a practice in exchange for the produce of the land. They were 'Alqama b. Qays and al-Aswad b. Yazīd,<sup>1</sup> Ṭāwūs,<sup>2</sup> Sālim b. 'Abd Allāh<sup>3</sup> and Muḥammad b. Sīrīn.<sup>4</sup> Abū Ja'far Muḥammad b. 'Alī b. Husayn al-Bāqir stated that most Medinans practised such a contract.<sup>5</sup> 'Umar b. 'Abd al-'Azīz practised such sharecropping with half of the produce without guarantee of seeds to his partner.<sup>6</sup> In addition, he prohibited the contract of al-musāqāt with unjust preconditions.<sup>7</sup> But Muḥammad b. Sīrīn lent some seeds to his partner and deducted from their shares to be given to him after harvest.<sup>8</sup> Ṭāwūs, on the other hand, allowed his partners to take extra share as a charge on the cost of seeds.<sup>9</sup>

Some of the Successors prohibited sharecropping.

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1. Huj., IV, pp. 172-74.
  2. Ibid., pp. 168 and 172.
  3. Ath., pp. 188 (856) and 189 (857).
  4. San., VIII, p. 100.
  5. San., VIII, p. 100; Haz. M., VIII, p. 216.
  6. San., VIII, p. 102.
  7. Mud., V, p. 5.
  8. San., VIII, p. 102.
  9. Ibid., pp. 101-02.

They were Ibrāhīm al-Nakha'ī,<sup>1</sup> Sa'īd b. al-Musayyib,<sup>2</sup> Sa'īd b. Jubayr, Mujāhid, al-Ḥasan al-Baṣrī,<sup>3</sup> 'Aṭā' b. Abī Rabāḥ,<sup>4</sup> Ṭawūs,<sup>5</sup> Ma'mar b. Rāshid<sup>6</sup> and al-Sha'bī.<sup>7</sup>

As a general rule, it seems that the reasons behind the prohibition of this contract were <sup>that</sup> the sharecropping was contracted with unjust preconditions, at unspecified time and unspecified amount of grain or unfixed amount of money-rent, which could cause hardships to the partners or the tillers of the land. By this time, the Successors subsumed all forms of sharecropping, i.e. al-muḥāqala, al-mukhābara, al-muzāra'a, al-musāqāt and kirā' al-arḍ under the same rubric of legal ruling. It may be seen as a certain development of social awareness among the Successors. Such an attitude was clearly visible when Sa'īd b. Jubayr ruled distinctly that such a practice of sharecropping was allowed if it was contracted with a specified measurement of land's produce or wheat, as a special dispensation or a concession (rukḥṣa),<sup>8</sup> possibly

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1. Ath., p. 188 (856).

2. San., VIII, p. 100.

3. Ath., p. 188 (856); San., VIII, p. 100.

4. Ath., p. 188 (856); M. in Um., VIII, p. 178.

5. San., VIII, p. 94.

6. San., VIII, p. 101; Haz. M., VIII, p. 216.

7. Ath., p. 188 (856).

8. Muw. Sh., p. 294.



if such a contract also met the above requirements.

Sa'id b. Jubayr regarded such a contract as the same as renting a house.<sup>1</sup> Such an opinion was made to meet the needs of social changes of the Muslim community and its ever extending realm without prejudicing or neglecting the very principle of the law, which had been laid down by the Prophet.

Concerning qabāla contract, Sa'id b. Jubayr regarded it as invalid, for the reason that tillers ('ulūj) on the land had never got just treatment from the landlords (the procuratores).<sup>2</sup>

II. Al-sharika or al-shirka (Mercantile partnership or commercial enterprise and consortium or corporation in business)

The definition of al-sharika

Literally, al-sharika or al-shirka<sup>3</sup> signifies a sharing, participating or participation, partaking or co-partnership.<sup>4</sup> Legally, al-sharika or al-shirka originally meant simply that a property belonged to several owners, or co-proprietors, in common, in such a way that each one had ownership of every smallest part

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1. Muw. Sh., p. 294; Huj., IV, pp. 187-88.

2. Amw., p. 70.

3. Lis., X, p. 448.

4. Lan., II, p. 1542.

of it in proportion to the share allotted to him. This type of transaction was commonly practiced among Semitic tribes.<sup>1</sup>

#### Partnership in pre-Islamic period

Al-sharika in business transactions was widely practised in the pre-Islamic period. The Arabs used to write down their agreement of partnership in business transactions in the form of written documents to avoid any disagreement. This text expressed the agreed terms of their partnership. Such partnerships took the form of business transactions and joint-stock companies (sharikāt al-musāhamāt). In the latter, the capital would be provided by one or more partners, and the work would be carried out by another. The profits or losses would be divided or incurred in accordance with the conditions agreed. Such partnership was normally undertaken by traders from Mecca to Yemen and al-Shām (Syria).<sup>2</sup> In this case, the partner was called al-jār. Al-jār is a partner in a partnership involving immovable property or trade.<sup>3</sup> From this historical evidence, it may be concluded that there is a difference between al-sharika, in general, and al-muḍāraba. In al-sharika, the capital

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1. W. Heffening, EI<sup>1</sup>, vol. IV, pp. 380-81.
  2. Muf., VII, p. 406.
  3. Taj., III, p. 111.

can be provided by one or more partners, whether in the form of immovable property or cash. All profits are divided among the shareholders in accordance with their agreement and any losses are shouldered by them.<sup>1</sup> In al-muḍāraba, any loss is the responsibility of the investor and not the agent-manager,<sup>2</sup> because he has no material share in the partnership.

Various accounts of reports show that such a partnership was widely practised in the pre-Islamic period. It was reported that Nawfal b. al-Ḥārith b. 'Abd al-Muṭṭalib became the partner of al-'Abbās b. 'Abd al-Muṭṭalib in an unlimited mercantile partnership (sharikat al-mufāwāḍa societas quaestus).<sup>3</sup> Ṣayfī b. 'Ā'idh became a partner of the Prophet, before his prophethood,<sup>4</sup> in trade in Yemen.<sup>5</sup> Al-Sā'ib b. al-Ḥārith b. Ṣabira was also a partner of the Prophet in pre-Islamic times in Mecca.<sup>6</sup> It was reported that the merchants of Yemen used to go to al-Ḥīra and the merchants of al-Ḥīra used to go to Mecca and Medina and that they all engaged in

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1. Haz. M., VIII, p. 124; infra chapter V, pp. 278-93.
  2. Intro., p. 156; supra chapter V, pp. 227-46.
  3. Muf., VII, p. 407.
  4. Ist. in Isa., II, p. 101.
  5. Isa., II, p. 10 (3065); Muf., VII, p. 407.
  6. Isa., II, p. 8 (3057). The Prophet praised for his sincerity and easiness to deal with in their partnership. See IH., II, p. 254.



such a partnership in the pre-Islamic era.<sup>1</sup> According to some reports, al-'Abbās b. Mirdās was the partner of Ḥarb b. Umayya<sup>2</sup> and al-'Abbās b. Anas was a partner of 'Abd Allāh b. al-Muṭṭalib (the father of the Prophet) in pre-Islamic times.<sup>3</sup>

#### The nature of al-sharika

Al-sharika may be concluded with regard to money, goods (these two are considered to be property as the capital), or work, or with regard to two or to all three of these values.<sup>4</sup> Any contract of such kind could be, and was referred to as a mercantile partnership, or al-shirka or al-sharika in Arabic. According to al-Sayyid Sābiq,<sup>5</sup> the root of this word in the Qur'ān is deduced

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1. Muf., VII, pp. 407-08.
  2. Ist. in Isa., III, p. 101; Isa., II, p. 272 (4511).
  3. Isa., II, p. 270 (4505).
  4. Kas., VI, pp. 56-57; Haz. M., VIII, pp. 123-24.  
There are two types of al-sharika, sharikat al-amwāl (partnership in property) and sharikat al-a'māl (partnership in work). In partnership in property, the partners contribute property individually, and in partnership in work the partners each contribute their work or expertise. But if the contributions involve a different nature, such a partnership is not recognized by the Islamic jurisprudence. See C. Com., pp. 23-24.
  5. Sab., III, p. 354.

from the verse:

"But if more than two, they share  
(shurakā') in a third."<sup>1</sup>

In its strict meaning, the word al-shirka or al-sharika, from the above verse, denotes partnership which implies equalization (al-taswiya) in gaining right.<sup>2</sup> More commonly, however, it implies al-khulṭa, literally "mixing (of the investment)".<sup>3</sup> Al-khulṭa is the common sense of the word al-shirka which implies one in which the contractors offer the various services in equal or unequal shares and partake in profit or loss in proportion to their investments.<sup>4</sup> This legal theory was based on the verse of the Qur'ān which says:

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1. Q., 4:12.

2. Mab., XI, pp. 169-70.

3. Jam., XV, pp. 178-79; cf. S.D. Goitein, 'Commercial and Family Partnership in the Countries of Medieval Islam', Islamic Studies, 3 (3) (Karachi, 1964), pp. 317-18. According to N.P. Aghides, al-khulṭa is the state of two properties being so mixed that they cannot be separated. See Nicolas P. Aghnides, op. cit., p. 209 (n.3); Lan., I, p. 789.

4. S.D. Goitein, op. cit., pp. 317-18.

"Truly many are the partners (in business) (al-khulaṭā') who wrong each other: not so do those who believe and work deeds of righteousness, and how few are they?"<sup>1</sup>

The "al-khulaṭā'" in this verse refers to associates in a partnership,<sup>2</sup> who have the right of equal co-ownership. These associates or partners amalgamate their properties, especially the partnership of live-stock (al-māshiya). The division of assets, in such

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1. Q., 38:24.

2. T.J., XXIII, p. 145; Sab., III, pp. 354-55. According to Mālik, if the two associates (al-khalīṭān) share one herdsman, one male animal, one pasture and one watering-place then the two men are associates (al-khalīṭān) as long as each one of them knows his own property from that of his companion. If someone cannot tell his property apart from that of his fellow, he is not an associate, but rather, a co-owner (al-sharīk). See Muw. Y., p. 211. But Abū Ḥanīfa considered al-khalīṭ (the associate) and al-sharīk (the partner) were the same. The latter's view was counter-argued by the forthcoming Tradition, infra chapter V, p. 281 showed both partners know the amount of respective shares, by retragrading them in accordance with the calculation and the Qur'ānic verse (38:24), "This man is my brother. He has nine and ninety ewes and I have (but) one" showed clearly that al-khulṭa was absolute co-operation, not partnership. See Zur., II, p. 119.



cases, should be effected by giving an equal share of profit in accordance with the capital and their works in the partnership.<sup>1</sup> This practice is supported by a Tradition from the Prophet:

"... And there was share between two partners (khalīṭayn), in a co-ownership, and whenever they withdraw or recess from partnership their properties are to be divided equally (in accordance with their respective participation)."<sup>2</sup>

Furthermore, al-khulṭa is a partnership which is different from the conventional type of partnership. In al-khulṭa every partner contributes his respective capital and one of the partners works individually or they amalgamate their capitals and work together to gain profits. All divisions of profits are on the basis of the capital and work which each individual partner has invested and profits which he has gained.<sup>3</sup>

#### The legitimacy of al-sharika and the Prophet

The Prophet's legitimization of the practice of al-sharika is to be found in four Traditions:

- i. The Prophet is reported to have said, in relation

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1. Cf. M. in Um., VIII, pp. 138-39; cf. Niha., II, p. 63.  
2. M. in Um., VIII, p. 138; Jam., XV, p. 179.  
3. Qas., IV, p. 284; cf. Lis., VII, p. 295.

to pre-emption:

"Whoever has a share in a piece of land or houses (ribā'), he is not permitted to sell it until his partner or co-owner (sharīkuh) gives his permission. If the partner wants it he can take (buy) it and if he wishes he can leave it, i.e. he can allow it to be sold to others."<sup>1</sup>

ii. The Prophet is reported to have said:

"The partner or co-owner (al-sharīk) is the one with the right of pre-emption (al-shafī') in anything."<sup>2</sup>

iii. The Prophet is reported to have decreed for partners the right of pre-emption in the case of property which had not been divided up.<sup>3</sup>

iv. The Prophet is reported to have said:

"And the partner or co-owner has superior or more right of pre-emption than the owner of an adjoining property)...."<sup>4</sup>

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1. San., VIII, p. 82.

2. Ibid., p. 88.

3. Muw. Y., p. 606.

4. Muw. Sh., p. 305. According to Abū Dāūd, the Prophet said: God says: I am the third partner (i.e. I will bless the two partners) as long as each of the two partners does not betray his partner. But when one of them becomes dishonest I will leave both of them." See Dau., III, p. 348.

The above four Traditions apply to a partner who is in joint or collective ownership or tenancy.

These accounts indicate that the Qur'ān and the Prophet approved of the concept of mercantile partnership or al-sharika or al-shirka and sanctioned it and its practice. He himself had engaged in mercantile partnership before his prophethood.

### The Companions

The practice and the rulings of the Companions on al-sharika were as follows:

a. The Companions continued to practise the contract of al-sharika in business transactions. As a further elaboration or extension of this contract, they engaged in al-sharika between two parties on credit, when one of them had no capital and the profits were divided, in accordance with the agreement, ~~between~~ them and any loss was to be deducted from the capital. Moreover, if one of the parties authorised either of them to buy and sell, the profits would be divided equally ~~between~~ them. Therefore, one of them could not consume the profits which had been entrusted by his partner. This was practised and made a legal precedent by 'Uthmān b. 'Affān.<sup>1</sup>

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1. Muw. Sh., pp. 283-84.



b. 'Alī b. Abī Ṭālib ruled that the proportional division of profits could be arranged or divided in accordance with what the parties had agreed (al-ribh 'alā māṣṭalaḥā 'alayh).<sup>1</sup> He added that all losses should be charged on the capital.<sup>2</sup>

c. 'Abd Allāh b. 'Abbās was of the opinion that the shareholders in a partnership were allowed to dissociate themselves from their contract provided both agreed. They were permitted to withdraw their respective shares or capitals in cash.<sup>3</sup> Possibly, the latter's ruling was to avoid any disagreement and confusion.

d. 'Abd Allāh b. 'Abbās allowed the withdrawal of shares by partners, in the form of either some of them in cash in unspecified currency and some of them in specified currency concurrently.<sup>4</sup>

e. 'Abd Allāh b. 'Abbās allowed the beneficiaries, in the case of inheritance, to withdraw partnership and take their shares from the debts.<sup>5</sup>

There is no indication that the contract of "al-khulaṭā'" was ever commented on by the Companions. This

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1. /Amali, p. 40; Mab., XI, p. 176; Haz. M., VIII, p. 126.
  2. Amali, p. 40; Mab., XI, pp. 176-77.
  3. San., VIII, p. 288.
  4. Ibid.
  5. Ibid., p. 289.

may indicate that they followed such a practice without any further ruling.

There were not many new rulings in the field of al-sharika made by the Companions.

### The Successors

The Successors recognized the legality of al-sharika. Evidence of their recognition of al-sharika is found in their rulings on its practice:

i. 'Aṭā' b. Abī Rabāḥ and Ṭāwūs continued to recognize the legality of a partnership of al-khulaṭā'.<sup>1</sup> They considered that al-khulaṭā' did not imply anything other than al-shurakā', where the associates or partners amalgamate their properties.<sup>2</sup> In this case, the division of assets should be effected by giving an equal share to the workers in the partnership in accordance with the agreement.

ii. Muḥammad b. Sīrīn and Qatāda, however, ruled that if the goods were unweighable or unmeasurable, either of the partners could take his own profits without them being weighed or measured, and Muḥammad b. Sīrīn allowed either of them to dissolve the contract and

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1. Supra chapter V, pp. 79-81.

2. Jam., XV, p. 179.

take his own share, before any settlement by weighing or measuring.<sup>1</sup>

Two other kinds of partnership (al-sharika):

1. Sharikat al-mufāwāḍa (unlimited mercantile or investment partnership, societas quaetus).<sup>2</sup>

Only the Successors recognized the legality of this type of pre-Islamic partnership, which had not been known of during the periods of the Prophet or the Companions.<sup>3</sup>

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1. San., VIII, p. 49.

2. This type of partnership is strongly disapproved of by al-Shāfi'i, see Um., IV, p. 206. It is disowned by Abū Ḥanīfa. But it is recognized by Abū Yūsuf, al-Shaybānī and Ibn Abī Laylā. In contrast, Sufyān al-Thawrī ruled that even a legacy to one of the shareholders becomes the property of the company, lucrum ex fortuna, which suggests the societas omnium bonorum. See Mab., XI, pp. 153-54; W. Heffening, EI<sup>1</sup>, vol. IV, p. 381.

3. San., VIII, pp. 258-60.



The definition of sharikat al-mufāwāḍa and its origin in pre-Islamic times

According to some scholars, literally al-mufāwāḍa means al-musāwāt (the equality)<sup>1</sup> According to some of them, legally, the term al-mufāwāḍa derives from al-tafwīḍ (delegation of authority),<sup>2</sup> for each partner empowers his colleague to act freely with the entire partnership's capital.<sup>3</sup> Sharikat al-mufāwāḍa may be best translated as a universal or unlimited investment partnership.<sup>4</sup> In this partnership, the partners have equal right (al-musāwāt) in the capital, profits, loss, of disposal and so on.<sup>5</sup> Each partner in this partnership, has full power and liability. The partnership amounts to a mutual procuration and suretyship and it is made with equal shares and it engages in the whole property of both partners except their food and clothing for themselves and their families and there are no separate social capital between the partners.<sup>6</sup>

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1. Faiq, II, p. 304; Mab., XI, p. 152; Kas, VI, p. 58.

2. Mab., XI, p. 152; Kas., VI, p. 58.

3. Lan., II, p. 2459; W. Heffening, EI<sup>1</sup>, vol. IV, p. 381; UP, p. 44.

4. Niha., III, p. 479; Taj, V, p. 71; Lan., II, p. 2459; UP, p. 40.

5. Mab., XI, p. 752; Kas., p. 58; W. Heffening, EI<sup>1</sup>, vol. IV, p. 381.

6. Intro., p. 156.

According to Udovitch, this partnership had similar features to those of the medieval European family compagnia.<sup>1</sup> But according to Heffening, sharikat al-mufāwāḍa (societas quaestus) appears to have originated from Roman Byzantine law.<sup>2</sup> This form of partnership was already commonly practised among the Arabs before the advent of Islam.<sup>3</sup>

#### The Successors and sharikat al-mufāwāḍa

The legal rulings of the Successors on this type of al-sharika are as follows:

a. Muḥammad b. Sīrīn was of the opinion that the partner is not allowed to sell any share which belongs to his colleague, without the latter's prior permission. Neither is he allowed to rescind a sale after he has permission from his colleague for such a sale. If he has informed his colleague about the selling, he is not allowed to rescind the sale of his colleague's share. However, in sharikat al-mufāwāḍa, the shareholder is allowed to enter into any contract of sale, purchase or rescission.<sup>4</sup> According to him, the capital should not be the goods and the absent property.<sup>5</sup>

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1. UP, pp. 122-23.

2. W. Heffening, EI<sup>1</sup>, vol. IV, p. 381.

3. Muf., VII, p. 407.

4. San., VIII, pp. 258-59.

5. Mab., XI, p. 176.

b. Muḥammad b. Sīrīn was of the opinion that sharikat al-mufāwada constitutes the property as a whole and therefore its share cannot be alienated to other people in the case of inheritance, except to its own beneficiaries.<sup>1</sup> According to al-Sha'bī, a share may be sold, except in the case of inheritance,<sup>2</sup> before being divided. According to him, the profit is to be divided in accordance with the agreement between the parties and the loss will be charged on the capital.<sup>3</sup>

c. According to Sufyān al-Thawrī, in sharikat al-mufāwada the shares in the property have to be equally amalgamated. This includes money, i.e. dīnārs or dirhams. Therefore, this type of company does not accept that goods should become the capital, except for certain properties, such as houses, gold and silver.<sup>4</sup>

2. Sharikat al-'inān (limited liability company or limited investment partnership)

Its definition and its origin in pre-Islamic times

According to some scholars 'inān, literally, means the rein of a riding animal which is held by one hand of a rider and, beside that, he lets the other hand do

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1. San., VIII, p. 259.
  2. Ibid.
  3. Mab., XI, p. 176.
  4. San., VIII, pp. 259-60.



other works freely. Legally, it implies that a partner offers or gives the right of disposal in some particular property to his partner but not the other or exclusive of the rest.<sup>1</sup>

This partnership or company is equivalent to a mutual procuration, each partner is answerable to third persons for his own transaction, and he has the right of recourse against the other partner in relation to the proportion of his share. This type of partnership engages the invested capital only, and may be limited to specific kinds of transaction. The shares of the partners can be different and their shares in the profit may differ from their invested shares in the capital, i.e., the profit is in proportion to their respective work and capital.<sup>2</sup>

This type of partnership had not appeared until the time of the Successors.<sup>3</sup> But, it was recorded that such partnership had been practised in pre-Islamic times.<sup>4</sup> Such a partnership had been called sharikat al-'inān.<sup>5</sup> Evidence of it had appeared in a poem by al-Nābigha

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1. Mab., XI, p. 151; Lan., II, p. 2166.
  2. Cf. Mab., XI, pp. 151-52; Intro., p. 156; cf. W. Heffening, EI<sup>1</sup>, vol. IV, p. 381.
  3. San., VIII, pp. 258-60.
  4. Kas., VI, p. 57; Muf., VII, p. 409.
  5. Taj., IX, p. 282; Lan., II, p. 1541.

al-Ja'dī:

"And we share with Quraysh in their piety  
And in their several grounds of pre-  
tension to respect with a sharing  
exclusive of other properties.<sup>1</sup>

It appears that, historically, this partnership was the  
older form of partnership.<sup>2</sup>

The Successors and sharikat al-'inān

The rulings of the Successors on this type of  
partnership are as follows:

- i. The profits are divided in accordance with the  
agreement between the parties and the loss will be  
charged on the capital, not on the worker. This was  
held by al-Sha'bī and Ibrāhīm al-Nakha'ī.<sup>3</sup>
- ii. The profits will be given to the worker in double  
proportion to the sleeping-partner. This was held by  
Ṭāwūs.<sup>4</sup> But Ma'mar b. Rāshid preferred that the profits  
should be divided in accordance with the agreement.<sup>5</sup>

It may be suggested that such a decision was made in  
order to give the partners more equitable rights in such  
a partnership.

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1. وشاركنا قريشا في تقاها وفي أحسابها شرك العنان

See Mab., XI, p. 151; Lan., II, p. 154; Lis.,  
XIII, p. 293.

2. W. Heffening, EI<sup>1</sup>, vol. IV, p. 381.

3. San., VIII, pp. 248-49; Haz. M., VIII, p. 126.

4. San., VIII, p. 249.

5. Ibid.

iii. The capitals are allowed to be amalgamated or otherwise in this type of company. But, should any loss or damage occur, the worker will be responsible, if the capitals are not amalgamated. This was the view of al-Sha'bī and Sufyān al-Thawrī.<sup>1</sup>

General issues in partnership

- i. Shurayh, Muḥammad b. Sīrīn, Qatāda, Ma'mar b. Rāshid and al-Ḥasan al-Baṣrī disallowed any partner in al-sharika to sell his own share and take the profits individually and differently, without dividing them in accordance with the agreement.<sup>2</sup>
- ii. According to al-Ḥasan al-Baṣrī and Ibrāhīm al-Nakha'ī, the partners are absolved of any liability to pay debts or damages which have been incurred at the hands of other partners.<sup>3</sup>
- iii. Muḥammad b. Sīrīn disallowed partners disassociating (takhāruj) the beneficiaries<sup>4</sup> from any partnership in the deceased's share, without any reason and without the latter's consent.
- iv. Muḥammad b. Sīrīn allowed any partner to purchase

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1. San., VIII, p. 249.

2. Ibid., pp. 260-61.

3. Ibid., p. 288.

4. Ibid., p. 289.



the share of his colleague, if such a share constitutes goods which are not measurable and weighable.<sup>1</sup>

v. 'Aṭā' b. Abī Rabāḥ disallowed disassociation, disengagement or withdrawal of shares in a partnership, except in the form of gold and silver,<sup>2</sup> and possibly in the form of money. It may be suggested that the Successors, by giving such ruling, endeavoured to avoid any disagreement in such cases.

### III. Al-shuf'a (Pre-emption)

#### Al-shuf'a : its definition and source

Literally, al-shuf'a means amalgamation, addition, subjunction or joining. It implies that a partner or co-owner amalgamates his partner's share with his own share; or he adds his partner's share to his property.<sup>3</sup> In the Qur'ān, it is mentioned that

"Whoever recommends and helps a good cause becomes a partner therein."<sup>4</sup>

This means that he enhances his good deed.

#### Legal interpretation of al-shuf'a

Legally, al-shuf'a implies that a co-owner has the

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1. San., VIII, p. 289.

2. Ibid., p. 288.

3. Zur., III, pp. 376-77; Lis., VIII, p. 184.

4. Q., 4:85.

right to demand a pre-emption from his partner in a jointly owned property to purchase it at a certain price,<sup>1</sup> before other people. In other words, al-shuf'a is the right to substitute oneself for the buyer in a completed sale of real property. It is granted by law and such rights cannot be bought.<sup>2</sup>

#### Al-shuf'a and its pre-Islamic background

i. Al-Zurqānī explains that in pre-Islamic times, whenever a partner sold his share to another person, the former's <sup>adjacent</sup> neighbour (al-mujāwir), i.e. who was as the holder of the right of pre-emption or pre-emptor, came to the purchaser to demand his right to buy the property which had been bought by the purchaser.<sup>3</sup>

ii. It is reported that in pre-Islamic times, when

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1. Zur., III, p. 377.

2. Intro., p. 142. According to Coulson, pre-emption is the right of a person with strictly defined interests in an immovable property to step into the shoes of the purchaser of such property and take it on the terms agreed between the parties. The pre-emptor is deemed to have had adequate time for reflection before he exercises his right to pre-empt and the consent of either the original seller or purchaser is irrelevant. See C. Com., p. 62.

3. Zur., III, p. 377; Sab., III, p. 215.

a man desired to sell a house, his neighbour used to come to him and make a demand to him respecting that which he sold, for the right of pre-emption and he pronounced him to have a better right of pre-emption to that which was sold than he whose connection was more remote.<sup>1</sup> Such a right was called shuf'a (pre-emption) and a claimant or one who claims such right was called shafī' (pre-emptor).<sup>2</sup>

### The legality of al-shuf'a

The origin of the legality of pre-emption lies in the Tradition from the Prophet when he is reported to have decreed the right of partners to pre-empt in property which had not been divided up. When boundaries had been fixed between them, then there was no right of pre-emption.<sup>3</sup> According to Mālik, that is the sunna (normative legal custom) about which there is no dispute among us (the Medinans).<sup>4</sup>

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1. Lis., VIII, p. 184; Lan., II, p. 1572.

2. Lis., VIII, p. 184. Other terms for pre-emption are: al-mashfū' fih (the pre-empted property); al-mashfū' minh (the purchaser other than the pre-emptor) and al-mashfū' bih (the property owned by the pre-emptor). See Muḥammad Abū Zahrah, Al-Imām Zayd: Hayātuh wa 'Aṣruh-Ārā'uh wa Fighuh (Cairo, 1959), p. 300.

3. Muw. Sh., p. 305; Muw. Y., p. 606; cf. Um. IV, p. 4; San., VIII, pp. 79-80.

4. Muw. Y., p. 606.



Request for authorization by a partner in a contract

It is incumbent on a partner to seek permission from his co-owner before any transaction of the partner's property. If the partner sells the property without the other's permission, he is more entitled to such property. However, if the co-owner allows such a transaction he has no right of pre-emption afterwards. The Prophet is reported to have said on this matter:

"Whoever has a share in a piece of land or houses is not permitted to sell it until he seeks permission from his co-owner. If he (the co-owner) wishes he can take it (the option of pre-emption) and if he does not wish he can leave it (to be sold to others)."<sup>1</sup>

The conditions for al-shuf'a

1. a. The pre-empted property (al-mashfū' fīh) is immovable real estate (landed property (al-'aqār)). The Prophet in the above Tradition<sup>2</sup> allowed the pre-emptor to buy land or a house from his co-owner, before it was offered for sale to others. Land and houses are immovable property.

b. The pre-empted property is movable (al-manqūl). On this subject, the Prophet is reported to have said:

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1. San., VIII, p. 82; Haz. M., IX, p. 85.

2. San., VIII, p. 82; Haz. M., IX, p. 85.

"The partner is a pre-emptor in anything  
[i.e. including movable property]."<sup>1</sup>

However, the Prophet is reported to have made some exceptions in pre-emption; not every immovable or movable property is allowed to be contracted or transacted in pre-emption. The Prophet is reported to have said: "No pre-emption in water, nor in street nor in male dates."<sup>2</sup> Those three properties were considered communal or res omnium communes.

ii. The pre-emptor (al-shafī') is a partner in the pre-empted property (al-mashfū' fīh). The Prophet is reported to have decreed the partners' (al-shurakā') right of pre-emption in property which had not been divided up. When boundaries had been fixed between them, then there was no right of pre-emption.<sup>3</sup> In another Tradition, the Prophet is reported to have granted pre-emption (to the partner) in every case of undivided (joint property). If, however, the boundaries of the property were demarcated or the ways and streets were fixed, then there was no pre-emption.<sup>4</sup> The second Tradition shows that the pre-emption is invariable in every joint tenancy involving

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1. San., VIII, pp. 87-88; Haz. M., p. 84.

2. San., VIII, p. 87.

3. Muw. Sh., p. 305; Muw. Y., p. 606; Um., IV, p. 4.

4. San., VIII, pp. 79-80.

co-owned property which is subject to division or allotment. However, if the boundaries of the property were demarcated or the ways and streets were fixed, then there was no pre-emption. Because there is no benefit or advantage to the partner, after the property has been demarcated and streets fixed.<sup>1</sup>

The degrees of priority of pre-emptors

Pre-emption has degrees of priority. The order as follows:

i. Al-sharīk (The co-owner). The co-owner or the partner in cases of undivided or undemarcated property is given first priority in pre-emption, because the Prophet decreed for partners (al-shurakā') the right of pre-emption in property which had not been divided up.<sup>2</sup> According to al-Ṣan'ānī, the Prophet is reported to have said:

"The co-owner is the pre-emptor in anything."<sup>3</sup>

Al-Shaybānī reported the Prophet as having said:

"... And the co-owner has more right to the pre-emption than the owner

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1. Cf. Mab., XIV, pp. 94-95; Sab., III, p. 220.

2. Muw. Sh., p. 305; Muw. Y., p. 606; Um., IV, pp. 4-5; cf. Intro., p. 42.

3. San., VIII, p. 88; Haz. M., IX, p. 84.



of an adjoining property (the neighbour, al-jār)."<sup>1</sup>

According to Ibn Ḥazm, the Prophet is reported to have said:

"The co-owner has more right (in pre-emption)."<sup>2</sup>

Ibn Ḥazm also said the Prophet had decreed pre-emption in every ownership which had not been divided up, whether a house or orchard. It was not permissible for a co-owner or partner to sell his share until his partner allowed it,<sup>or</sup> if he wished he could take the pre-emption or otherwise. However, if the former co-owner or partner had sold the property without his co-owner's or partner's permission, the second partner had more right of pre-emption.<sup>3</sup> Each partner has equal right in pre-emption.<sup>4</sup> The partner is regarded<sup>as</sup> the first pre-emptor, because he shares many priorities with his own partner, including the property itself and the access road to it. This was held by Abū Ḥanīfa, al-Shaybānī and Abū Yūsuf.<sup>5</sup>

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1. Muw. Sh., p. 305.

2. Haz. M., IX, pp. 95, 97 and 98.

3. Ibid., p. 88.

4. Ibid., p. 97.

5. Taha., IV, p. 124.

ii. Al-shafī' (The owner of a servitude in the property)<sup>1</sup>

Al-shafī' has second priority in a pre-emption.<sup>2</sup>

The Prophet is reported to have said:

"Al-shafī' has a greater priority than the owner of an adjoining property (al-jār) (in pre-emption)."<sup>3</sup>

iii. Al-jār (The owner of an adjoining property<sup>4</sup> or the neighbour)

Al-jār has the third order of priority in a pre-emption. The Prophet is reported to have said:

"... and the owner of an adjoining property (al-jār) has greater priority (in pre-emption) than the lateral owner of an adjoining property who does not belong to the family (al-jār al-janb)."<sup>5</sup>

The Prophet also is reported to have said:

"The owner of an adjoining property is entitled (to the right of pre-emption) to the benefit of his contiguity or proximity."<sup>6</sup>

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1. Mab., XIV, p. 92; Intro., p. 142.

2. Ikhtilaf, p. 37.

3. San., VIII, p. 79.

4. Intro., p. 142..

5. San., VIII, p. 79.

6. Muw. Sh., p. 305; cf. Han. M., p. 165 (349); Ath., p. 167 (767); M. in Um., VIII, p. 218; San., VIII, p. 78.

According to Abū Ḥanīfa, the owner of an adjoining property is also called al-jār al-mulāṣiq (the adjacent or adjoining neighbour).<sup>1</sup> In this respect, such a neighbour or the owner of an adjoining property has more right than others. His right of option should be reserved until he is present, if he is absent or is away. The Prophet is reported to have said:

"The owner of an adjoining property (the neighbour) has more right ~~to~~ his pre-emption; he should be waited for (until he is back) (to be given his right of pre-emption) if he is absent, if the passage between the two adjoining properties belongs to them both."<sup>2</sup>

The Prophet is also reported to have said:

"The owner of an adjoining property (the neighbour) of the house has more right to the house and the land (in the pre-emption)."<sup>3</sup>

According to Abū Ḥanīfa,<sup>4</sup> al-Shāfi'i<sup>5</sup> and al-Muzanī,

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1. Ikhtilaf, p. 37.

2. J. Ma., II, p. 51; Huj., III, p. 75; San., VIII, p. 81; Haz. M., IX, p. 101.

3. Haz. M., IX, p. 101.

4. Cf. Ikhtilaf, p. 37; Um., IV, p. 7.

5. Um., IV, p. 7.



the owner of an adjoining property (the neighbour) is entitled to the right of pre-emption in undivided property only.<sup>1</sup>

iv. Al-jār al-janb (the lateral owner of an adjoining property (the adjacent neighbour),<sup>2</sup> not belonging to the family).<sup>3</sup>

Al-jār al-janb is the pre-emptor last in order of priority for pre-emption. The Prophet is reported to have said:

"And the owner of an adjoining property (the neighbour) has more priority than (al-jār) al-janb (the lateral owner of an adjoining property not belonging to the family) (in pre-emption)."<sup>4</sup>

#### Pre-emption and the creditor

In addition to the above order of priority of pre-emption, the right of a creditor must be considered. He may have more right than all the above pre-emptors, when the borrower is unable to pay the debt in movable or immovable property. It was reported that the Prophet had decreed pre-emption in debt. In such a case, a man

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1. Amr., p. 154.

2. Lan., I, pp. 465-66.

3. T. Ta., V, p. 80.

4. San., VIII, p. 79.

who is on credit (a debtor) was selling the credited property to others, and the Prophet decreed that the creditor (ṣāhib al-dayn) had more right to that loaned property, by pre-emption, than other people.<sup>1</sup>

### The Companions

In the case of al-shuf'a, the Companions recognized the legality, including conditions and injunctions, of al-shuf'a as deemed to have been laid down by the Prophet. Their extended rulings on al-shuf'a were as follows:

i. 'Umar b. al-Khaṭṭāb was of the opinion that if the land was divided, the boundaries of the land were demarcated and every individual right was known, then there was no pre-emption.<sup>2</sup> Further, he emphasized that, in such a case, there was no right of pre-emption among people who knew clearly their respective rights (on the land).<sup>3</sup> 'Uthmān b. 'Affān was of the same opinion and added further that there was no right of pre-emption in the case of a well or a male palm-tree (fahl

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1. San., VIII, pp. 88-89; Haz. M., IX, p. 89.

2. San., VIII, p. 80; Haz. M., IX, pp. 84 and 99.

3. Haz. M., IX, p. 84.

al-nakhl),<sup>1</sup> also that the existence of boundaries removed the right of pre-emption.<sup>2</sup>

ii. There is no decree of pre-emption to a partner, except in the case of (immovable) property which is not divided. This was held by 'Alī b. Abī Ṭālib and 'Abd Allāh b. 'Abbās.<sup>3</sup> 'Alī b. Abī Ṭālib added that the priority is considered in the right of pre-emption in accordance with the amount of respective shares of the co-owners.<sup>4</sup> Further, according to 'Abd Allāh b. 'Abbās, no pre-emption pertained except in the case of lands.<sup>5</sup>

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1. Muw. Sh., p. 305; Muw. Y., p. 610; San., VIII, pp. 80, 87 and 88. According to Ibn al-Athīr, the Muslim community had their palm-trees in their orchards. They inherited them and divided them among themselves. They had their own male palm-trees for pollinating the female palm-trees. If one of them sold his own share in the orchard of male palm and other trees, then there was no pre-emption for his partners in the case of male palm-trees because his share was already divided among the beneficiaries. See Usul, I, p. 586.
  2. Haz. M., IX, p. 83; cf. Haz. M., IX, p. 99.
  3. Um., IV, pp. 8 and 9; Mab., XIV, p. 94.
  4. Mud., V, p. 401.
  5. Um., IV, p. 7; Haz. M., IX, p. 87.



iii. According to 'Umar b. al-Khaṭṭāb a Muslim is allowed to make a pre-emption to a dhimmi (a free non-Muslim subject living in an Islamic state who, in return for paying the capitation tax (al-jizya), enjoyed protection and safety and is exempted from military service)<sup>1</sup> and a Christian.<sup>2</sup>

iv. 'Alī b. Abī Ṭālib and 'Abd Allāh b. 'Abbās decreed that the right of pre-emption was given to the co-owner (al-sharīk) or the partner in cases of undivided property only. This was held by the people of al-Ḥijāz.<sup>3</sup>

v. 'Umar b. al-Khaṭṭāb decreed, as the Prophet had done, pre-emption in respect of al-jār al-mulāziq (the owner of an adjoining property (neighbour)).<sup>4</sup> Sa'd b. Abī Waqqāṣ also gave priority to his al-jār (the owner of an adjoining property, the neighbour), in pre-emption.<sup>5</sup>

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1. Kas., V, p. 16.

2. Mab., XIV, p. 93.

3. Ikhtilaf, pp. 37-39.

4. According to Ibn Ḥazm, the unfamiliar word of "al-mulāziq" (the adjoining) was added by some transmitters. Haz. M., IX, pp. 100 and 105.

5. Huj., III, pp. 74-75; Ath., p. 167 (767); Mab., XIV, p. 91; Haz. M., IX, p. 100.

## The Successors

The Successors continued to develop the legal theory and practice of al-shuf'a by extending their rulings on the subject as follows:

i. Shurayh was of the opinion that there is no pre-emption except in immovable property, real estate or land.<sup>1</sup> This was also held by al-Ḥasan al-Baṣrī, Muḥammad b. Sīrīn, Ibrāhīm al-Nakha'ī,<sup>2</sup> al-Sha'bī,<sup>3</sup> Sa'īd b. al-Musayyib and Sulaymān b. Yasār.<sup>4</sup> Sa'īd b. al-Musayyib and Sulaymān b. Yasār considered that pre-emption in cases of immovable property is among the shareholders only.<sup>5</sup> According to Sa'īd b. al-Musayyib, there is no pre-emption in the case of animals<sup>6</sup> and al-Ḥasan al-Baṣrī and al-Sha'bī disallowed pre-emption with regard to dowry.<sup>7</sup> But Muḥammad b. Sīrīn and al-Ḥasan al-Baṣrī allowed pre-emption in a partnership, even though the shares are movable property.<sup>8</sup> However, 'Aṭā' b. Abī Rabāḥ allowed pre-emption in movable and immovable property.<sup>9</sup>

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1. San., VIII, p. 87.

2. J. Ma., II, p. 51.

3. Haz. M., IX, pp. 86-87.

4. Muw. Y., p. 606.

5. Muw. Y., p. 606; Haz. M., IX, pp. 90-100.

6. San., VIII, p. 89.

7. Haz. M., IX, p. 88.

8. Ibid., p. 83.

9. Ibid., p. 84.

- ii. Muḥammad b. Sīrīn allowed selling a share, to a pre-emptor, before it had been divided except if such shares are undividable, unmeasurable or unweighable property.<sup>1</sup> But al-Ḥasan al-Baṣrī disallowed such a transaction,<sup>2</sup> except jewellery or undivided goods only. Al-Sha'bī and al-Ḥasan al-Baṣrī ruled that if a share has been sold to another, the other partners have no right of pre-emption, but according to Ibn Ḥazm, such a view was against the principle of pre-emption.<sup>3</sup>
- iii. The shareholders, regardless of the different shares which they hold, will have the same right of pre-emption and divide the profits equally, when they sell their property. This was held by Ibrāhīm al-Nakha'ī, al-Sha'bī and al-Ḥasan al-Baṣrī.<sup>4</sup>
- iv. 'Umar b. 'Abd al-'Azīz decided that there was no pre-emption if the boundaries of land had been demarcated<sup>5</sup> or divided.<sup>6</sup> He did not determine the right of pre-emption between two owners of an adjoining property (the neighbours) except where they have an integrated property

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1. Haz. M., IX, p. 83.

2. Ibid.

3. Ibid., p. 97.

4. Ibid., p. 98.

5. San., VIII, p. 80; Haz. M., IX, p. 99.

6. Haz. M., IX, p. 100.



or a house which is locked by one door. But where the land has been divided and demarcated and the direction of the roads have been altered, there is no more pre-emption.<sup>1</sup> But Ṭāwūs, in the case of divided property, gave the right of pre-emption to the owner of an adjoining property (the neighbour).<sup>2</sup> It seems that the latter made an endeavour to save the right of the owner of an adjoining property (the neighbour).

v. Al-Sha'bī and al-Ḥakam b. 'Utayba were of the opinion that the absent pre-emptor had the same right of pre-emption<sup>3</sup> as the one who was present had. Moreover, 'Umar b. 'Abd al-'Azīz determined that the durability of the right of pre-emption, in the case of the absence of a pre-emptor is fourteen years.<sup>4</sup> But according to Ibrāhīm al-Nakha'ī, the absent person has no right of pre-emption.<sup>5</sup>

vi. A pre-emptor loses his right of pre-emption, after he has permitted the sale of his pre-emption. He is a witness who cannot deny any claim. This was held by al-Sha'bī.<sup>6</sup> He opined that if one of the partners sells

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1. San., VIII, p. 80; Haz. M., IX, p. 100.

2. San., VIII, p. 80.

3. Ibid., p. 81.

4. Ibid.

5. Haz. M., IX, p. 94.

6. San., VIII, p. 83.

his share to other people, then the other partners lose their right to it,<sup>1</sup> possibly after their approval.

vii. The right of pre-emption is for the one who makes the prompt assertion of a claim in the presence of witnesses (muwāthaba). This was held by Shurayḥ and Ma'mar b. Rāshid.<sup>2</sup>

viii. The right of pre-emption is not to be sold, given away or granted, inherited and lent. Such a right belongs to its owner only and it has been given to him. This was held by al-Sha'bī and al-Thawrī.<sup>3</sup>

ix. According to al-Sha'bī, if a pre-emptor finds a building erected on a piece of land, the value of the land will be fixed by the standard of value or according to the value of the building.<sup>4</sup> But al-Thawrī was of the opinion that the building should be sold to the pre-emptor ~~at~~ half of the costs of the building.<sup>5</sup>

x. According to 'Umar b. 'Abd al-'Azīz, a Jew has the right of pre-emption. Shurayḥ considered the Christian has such a right as well.<sup>6</sup> Al-Thawrī added further that

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1. Haz. M., IX, p. 97.

2. San., VIII, p. 83; Huj., III, pp. 92-93.

3. San., VIII, p. 83; Haz. M., IX, p. 96.

4. San., VIII, p. 83.

5. Ibid., p. 84.

6. In another report, Shurayḥ opined that the Jew, the Christian and the Magian have the right of pre-emption from a Muslim. This was held by Ibn Abī Laylā. See Mab., XIV, p. 93.

the old, the minor, the desert dweller, the Jew, the Christian, the Magian have this right. The durability of such a right for them is three days, if they know. If they remain or linger without any claim of such right, more than three days, they are suspected of deliberate delay, even though they claim that they do not know it.<sup>1</sup> However, al-Sha'bī considered that the desert dweller<sup>2</sup> and al-dhimmi<sup>3</sup> had no such right. According to Ibrāhīm al-Nakha'ī, the absentee loses his right of pre-emption.<sup>4</sup>

xi. The right of pre-emption is counted or considered as the right of the pre-emptors and they are regarded as having the same right regardless of the differences in their respective shares. This was held by al-Sha'bī, Ibrāhīm al-Nakha'ī,<sup>5</sup> al-Ḥasan al-Baṣrī, al-Thawrī, Ibn Abī Laylā and Abū Ḥanīfa.<sup>6</sup> But Shurayḥ, 'Aṭā' b. Abī Rabāḥ and Muḥammad b. Sīrīn were of the opinion that the amount of allotment or shares are to be considered or looked into,<sup>7</sup> in giving preference or priority in matters

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1. San., VIII, pp. 84-85.

2. Ibid., p. 85.

3. Haz. M., IX, p. 94.

4. Ibid.

5. San., VIII, p. 85.

6. Haz. M., IX, pp. 98-99.

7. San., VIII, p. 85.



of the right of pre-emption.

xii. The right of pre-emption terminates when the pre-emptor dies, before accepting it. His beneficiaries have no right of pre-emption either. This was held by Muḥammad b. Sīrīn.<sup>1</sup>

The degrees of priority in pre-emption

Pre-emption has degrees of priority. According to the Successors, the order is as follows:

i. Al-khalīṭ (the co-owner, the associate; al-sharīk<sup>2</sup>). This was held by Ibrāhīm al-Nakha'ī,<sup>3</sup> al-Ḥasan al-Baṣrī,<sup>4</sup> Qatāda<sup>5</sup> and Shurayḥ.<sup>6</sup>

ii. Al-shafī' (the real pre-emptor; the owner of a servitude in the property).

This was the opinion of Shurayḥ and al-Sha'bī.<sup>7</sup>

iii. Al-jār; al-laṣīq (the owner of an adjoining property).

This view was held by Ibrāhīm al-Nakha'ī,<sup>8</sup>

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1. Haz. M., IX, p. 96.

2. Mab., XIV, p. 92; see supra chapter V, pp. 279-81 and 285.

3. Haz. M., IX, p. 100.

4. San., VIII, p. 79.

5. Haz. M., IX, p. 100.

6. Taha, IV, p. 125; Mab., XIV, p. 92.

7. San., VIII, pp. 78-79.

8. San., VIII, p. 79; Haz. M., IX, p. 100.

Shurayh,<sup>1</sup> Qatāda and al-Ḥasan al-Baṣrī.<sup>2</sup> In the case of neighbourhood, Shurayh,<sup>3</sup> Ibrāhīm al-Nakha'ī and Ṭāwūs<sup>4</sup> were of the opinion that priority is considered on the basis of closeness of doors or entrances (al-abwāb). Further, Shurayh decreed that, in this case, the closeness of the wall (al-jadr), i.e. the closest is given the first right of pre-emption, and this must also be considered.<sup>5</sup> However, according to Qatāda, al-Ḥasan al-Baṣrī and Ḥammād, there is no pre-emption for an owner of a property whose property is adjacent to the property in question ~~when~~ there is a road, which does not belong to or is not owned by either party, in between the property concerned.<sup>6</sup> According to 'Umar b. 'Abd al-'Azīz no right of pre-emption would be given to an owner of an adjoining property in a divided land.<sup>7</sup>

iv. The others. This was held by Shurayh and Ibrāhīm al-Nakha'ī.<sup>8</sup>

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1. Huj., III, pp. 74-75; Mab., XIV, p. 92; Haz. M., IX, p. 100.
  2. San., VIII, p. 78.
  3. Ath., p. 167 (766); J. Ma., II, p. 51.
  4. San., VIII, p. 81; Mab., XIV, p. 93.
  5. San., VIII, p. 82.
  6. Haz. M., IX, p. 100.
  7. Ibid.
  8. San., VIII, pp. 78-79.

### Conclusion

This chapter portrayed the elementary process of the development of legal theories of al-muḍāraba (dormant partnership) and its identical contracts and al-sharika (mercantile partnership). As there are correspondent or relevant contracts to the said contracts, especially al-sharika, al-shuf'a (pre-emption) is included to give clearer understanding of these particular legal aspects of business transactions.

Of the above commercial institutions some were Arabian but some others were of Byzantine<sup>or</sup> Sāssānian origins. They were developed in the Arabian peninsula before the advent of Islam. It appears that the main function of Islamic law, initially, in this case the Prophet, was to reinstate the applicability of such institutions in accordance with its jurisprudential principles. Beside that, these institutions or business contracts were put to practical use by being interpreted and realistically modified by the succeeding generations, after the Prophet, to keep pace with changing social needs and economic necessity of the Muslim community. Such circumstantial interpreted institutions which suited their applications in new environments were for instance in the case of the reintroduction of lawful agricultural sharecropping (métayage agricole) and the legalization of sharikat al-muwāfada (unlimited investment partnership, societas quaetus). Such commercial



institutions and others were adopted, in their practices, with new specified legal conditions in accordance with the principles of the Islamic legal system to make them remain Islamic and lawful in ever growing worldly conditions and ever changing times.

CHAPTER VI

LOANS, DEPOSIT AND AL-ḤAJR (INTERDICTION)

This chapter will look at the embryonic development of judicial injunctions in regard to loans, deposit and interdiction. The investigation will concentrate on:

I. Al-qard (Loan of fungible objects for consumption mutuum)

Its definition, pre-Islamic background, the legality of al-qard, conditions and the legal decisions by the Qur'ān, the Prophet, the Companions and the Successors.

II. Al-'āriyya (Loan of non-fungible objects or commodity or gratuitous loan, commodatum)

Its definition, pre-Islamic background, the legality of al-'āriyya, conditions and the legal decisions by the Prophet, the Companions and the Successors.

III. Al-wadī'a (Deposit)

Its definition, the origin, pre-Islamic practice and legality of al-wadī'a, conditions and the legal decisions by the Qur'ān, the Prophet, the Companions and the Successors.

IV. Al-ḥajr (Interdiction)

Its definition, origin and its pre-Islamic practice.  
The legal decisions of the Qur'ān, the Prophet,  
the Companions and the Successors on:

1. Al-ḥajr on the bankrupt (al-muflis)

Legal management of others' and the bankrupt's  
property.

No interdiction on the impoverished.

2. Al-ḥajr on the legal incompetent (al-saflh)

3. Al-ḥajr on the minor (al-saghīr)

The determination of competency of a minor.

The guardian and the management of property.

The use of an orphan's property; and

The maintenance of a minor.



I. Al-qard (Loan of fungible objects for consumption,  
mutuum)

The definition of al-qard

Literally, aqraḍahu means he cut off for him a portion to be requited or compensated for it. Legally, it signifies he granted him a loan (qard) or the like.<sup>1</sup> According to Ibn Ḥazm, al-qard, which also implies future obligation (al-dayn), is a good deed, involving the lending of a fungible object, such as money, by someone to another person, on condition that the borrower is responsible to return the same object either immediately or at a specified time.<sup>2</sup> It was also known as al-salaf.<sup>3</sup>

Pre-Islamic lending and borrowing

Lending and borrowing were highly important factors in business transactions in pre-Islamic times. Borrowing played a risky role in the general lives of pre-Islamic Arabs, due to the needs of traders or merchants and consumers or buyers in transactions of loans. In such obligations, the lenders gained a multitude of profits out of each contract of loan.<sup>4</sup> During these periods,

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1. Lan., II, p. 2515.

2. Haz. M., VIII, p. 77.

3. Niha., II, p. 390; supra, chapter III, pp. 173-74.

4. Muf., VII, p. 404.

any loans were heavily involved with usury<sup>1</sup> and without any proper procedure, i.e. without fixing time of payment and without written agreement and witnesses or security. In this situation many injustices occurred which Islam endeavoured to eradicate.<sup>2</sup>

The legality of al-qard

The legality of the practice of al-qard was mentioned in the Qur'ān and the Tradition as follows:

1. In the Qur'ān it is stated that:

"O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, put them in writing."<sup>3</sup>

According to al-Ṭabarī, the injunction from the Qur'ān was also applied to al-qard and al-salam (sale by advance).<sup>4</sup> Al-dayn, according to the definition of the majority of jurists, is an obligation for a certain period and al-qard is an obligation for an uncertain period. There are certain conventional distinctions (furūq 'urfiyya) between the above two obligations and al-salam.<sup>5</sup> However, al-qard is related, specifically,

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1. T.J., IV, p. 90; cf. 'Imād al-Dīn, Abū al-Fidā' Ismā'īl b. Kathīr, Tafsīr al-Qur'ān al-'Azīm, I (Beirut, 1388/1969), pp. 331 and 404.

2. Cf., Q., 2:282 and 283.

3. Q., 2:282.

4. T.J., III, p. 116.

5. Taj., IX, p. 207.

to the exchange of property, after consumption.<sup>1</sup>

ii. The legality of al-qard<sup>was</sup> in accordance with the Tradition of the Prophet, as it was recorded by Ahmad b. Hanbal, in which the Prophet is reported to have said:

"God will put a servant of Him under His shade on the day when there will be no shade except His shade, who waits (patiently) (any debt) from a borrower who lives in straitened circumstances (poor or impoverished) or relinquishes (the debt altogether) for the debtor."<sup>2</sup>

In the case of al-qard, the borrower may lend the borrowed object to a third party, but he must not hire it out or give it as a security. The owner may at any time demand the return of the object which he has lent but he may become liable for damages, for instance if he prematurely demands the return of a field which he has lent for a long period and the borrower has planted on it.<sup>3</sup>

Illegitimate (unlawful) and permissible conditions in loan (al-qard)

i. The payment of loan is obligatory. The Prophet is reported to have said:

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1. Taj., V, p. 76. See for the contract of al-salam, supra chapter III, pp. 173-93.

2. Ah. M., II, p. 5 (532); cf. J. Ma., II, p. 72.

3. Intro., p. 157.



"... Any loan must be paid..."<sup>1</sup>

ii. It is not permitted to specify any pre conditions in a qard contract. For example, if it is stipulated that the borrower has to return a quantity or sum which amounts to either more or less than that which has been lent, such excess or otherwise is considered as usury. Furthermore, no condition is allowed which requires the return of any object other than the borrowed or loaned object itself. Neither is it allowed to stipulate any condition concerning place of returning the borrowed object nor concerning any surety or guarantor (dāmin).<sup>2</sup> According to Ibn Ḥazm, the Prophet is reported to have prohibited any condition, not specified in the Book of God (the Qur'ān), to be stipulated in any contract. Such conditions are considered invalid.<sup>3</sup> However, if a borrower returns the borrowed object in higher quality, quantity or value of his own free will, such an act is commendable (mustahabb). Likewise, if the lender is willing to take back the loaned object in lesser or lower quality, quantity or value of his own free will. This act is also regarded as commendable conduct.<sup>4</sup> In relation to this, the Prophet is reported to have said:

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1. J. Ma., II, p. 58; Amali, p. 33.

2. Haz. M., VIII, pp. 77 and 79.

3. Ibid., p. 77.

4. Ibid., pp. 77 and 79.

"... and the property of a Muslim is not permitted to be consumed except what is granted good heartedly."<sup>1</sup>

Such acts were exhorted by Jābir b. 'Abd Allāh who said that the Prophet repaid him the debt he owed him and gave him an extra amount.<sup>2</sup> According to Abū Hurayra, the Prophet is reported to have said:

"The most admirable person among you is the most beneficent or charitable one among you in his payment (of his loan or debt)."<sup>3</sup>

The Prophet is also reported to have said:

"The best of people are those who discharge their debts in the best manner."<sup>4</sup>

iii. It is not permissible to pay a loan with an object other than the type of borrowed object, whether with a condition or otherwise. According to Ibn Ḥazm, such an act is not allowed because it would mean the borrower returning the loan in the form of another object and taking the borrowed object as a right, which would amount to consuming property by deception.<sup>5</sup> This corresponds

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1. Waq., III, p. 1111.

2. San., VIII, p. 318.

3. Haz. M., VIII, p. 77.

4. Muw. Sh., p. 293; Muw. Y., p. 567; cf. San., VIII, pp. 317-18.

5. Haz. M., VIII, p. 79.

to a verse in the Qur'ān:

"O ye who believe! Eat not up your property among yourselves in vanities: but let there be amongst you trade by mutual good will."<sup>1</sup>

iv. If a loan is made without specifying the time of repayment, the borrower may repay it at any time until the death of the lender. However, the Prophet urged all people, including borrowers to give to anyone that which they are rightly owed, including a repayment of a loan.<sup>2</sup>

v. If payment of a loan is to be made at a specified time, then the parties are required to write an agreement before two male witnesses or one man and two or more women of honourable reputation or record. If the contract is made during a journey and there is no writer, the lender has the right to demand a mortgage, security or pledge if he so wishes. An instantaneous or current loan does not require such conditions. The above conditions correspond to two verses in the Qur'ān:

"O ye who believe! When ye deal with each other, in transactions involving future obligations in a fixed period of time, put them in writing. Let a scribe write down faithfully as

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1. Q., 4:29

2. Haz. M., VIII, p. 79.



between the parties: let not the scribe refuse to write: as God has taught him, so let him write. Let him who incurs the liability dictate, but let him fear his Lord God, and not diminish aught of what he owes. If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully. And get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her. The witnesses should not refuse when they are called on (for evidence). Disdain not to reduce to writing (your contract) for a future period, whether it be small or big: it is juster in the sight of God, more suitable as evidence, and more convenient to prevent doubts among yourselves but if it be a transaction which ye carry out on the spot among yourselves, there is no blame on you if ye reduce it not to writing. But take witnesses whenever ye make a commercial contract; and let neither scribe nor witness suffer harm. If ye do (such harm), it would be wickedness in you. So fear God; for it is God that teaches you and God is well acquainted with all things. If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose)...."<sup>1</sup>

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1. Q., 2:282 and 283.

vi. If the current loan or the loan of the fixed time of payment arrives, the lender is allowed to claim the loan, whenever he meets the borrower in a near or a far country. A solvent borrower may be forced by a judge to repay a loan.<sup>1</sup> The Prophet is reported to have said:

"Delay (in the payment of debt) on the part of a rich man is injustice."<sup>2</sup>

The Tradition shows that it is forbidden for a person who is solvent to delay in the payment of debt. Such an unjust act had been commonly practised in pre-Islamic times, which caused a lot of hardships to the lenders.<sup>3</sup>

vii. It is permissible to engage in lending contract involving any object, whether the object is an animal, houses, lands or others, whether movable or immovable properties.<sup>4</sup> The verses in the Qur'ān which refer to loan<sup>5</sup> are general in their implication, and because of their generality, imply any object of lending.<sup>6</sup>

viii. It is not permissible to specify a pre-condition whereby the borrower has to pay half of the loan due at

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1. Haz. M., VIII, p. 80.

2. Muw. Y., p. 562; San., VIII, pp. 316-17.

3. Muf., VII, p. 562.

4. Haz. M., VIII, p. 82.

5. See Q., 2:282 and 283 above.

6. Haz. M., VIII, p. 82.

a specified time, immediately. This is not allowed, because the parties would be applying a condition which is not referred to in the Qur'ān and which is therefore, by implication, invalid. However, if the borrower wishes to pay the loan before the specified time, of his own free will, as a gesture of his good will, to the lender then this is encouraged.<sup>1</sup> Such an act corresponds with the verse in the Qur'ān:

"... And do good that ye may prosper."<sup>2</sup>

ix. In the case of a loan to be paid at a specific time, the lender is allowed to wait to reclaim his loan until the specified time arrives, even if the borrower wishes to pay it immediately. However, a current loan can be reclaimed at any time the lender wishes. According to Ibn Ḥazm, this type of act is allowed, because no condition is stipulated in it. There is no obligation of immediate repayment,<sup>3</sup> as it is prescribed in the Qur'ān.<sup>4</sup>

x. When a borrower dies, all his loans which may be fixed in time, will be dissolved and become current loans. According to Ibn Ḥazm,<sup>5</sup> evidence for this practice

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1. Haz. M., VIII, p. 84.

2. Q., 22:77.

3. Haz. M., VIII, p. 84.

4. See Q., 2:282

5. Haz. M., VIII, pp. 84-85.



is found in the verse of the Qur'ān:

"Every soul draws the meed of its  
acts on none but itself."<sup>1</sup>

The Prophet is also reported to have said:

"Surely, your blood and your  
property are sacrosanct."<sup>2</sup>

Also,

"The deceased person is held in pledge  
with his debt (or responsible for it)  
till he pays it."<sup>3</sup>

The debts of the deceased borrower must be paid by the  
beneficiaries and legatees,<sup>4</sup> as is stated in the Qur'ān:

"After payment of legacies and debts;  
so that no loss is caused (to anyone)."<sup>5</sup>

xi. It is permissible to give the loan as a gift, without  
any liability to the borrower. This injunction is based  
on a Tradition from the Prophet which indicated that he  
preferred to give<sup>6</sup> and accept a gift.<sup>7</sup> The Traditions

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1. Q., 6:164.

2. Waq., III, p. 1103; IH., IV, p. 185.

3. J.Ma., II, p. 74.

4. Haz. M., VIII, p. 85.

5. Q., 4:12.

6. San., VIII, pp. 144-45 and 318.

7. Ibid., pp. 317-18.

indicate that anyone is permitted to give and to receive any gift, including a loan from a lender.<sup>1</sup>

The above conditions formed the embryonic concept of al-qard, in early Islamic law, being developed later by the Companions and the Successors.

### The Companions

The Companions consented to the practice of al-qard as the Prophet did. They continued to make some extensive rulings on this subject. Those judicial rulings were as follows:

- a. Any pre-condition, stipulated between the parties in a qard transaction, imposes on the borrower the obligation to return a quantity or sum which amounts to either more or less than that which has been lent; such excess or otherwise is considered as usury. This was held by 'Abd Allāh b. 'Umar<sup>2</sup> and 'Abd Allāh b. Mas'ūd.<sup>3</sup> But if the borrower returns the loan, without any prior condition except for the payment of the debt, with an excess greater than the original loan in good spirit, such practice is regarded as lawful. This opinion was

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1. Haz. M., VIII, pp. 85-86.

2. Muw. Y., p. 568; San., VIII, p. 146; Mud., IV, p. 133.

3. Mab., XIV, p. 36; Abū al-Walīd Muḥammad b. Aḥmad b. Rushd, Kitāb al-Muqaddimāt, II (Beirut, n.d.), p. 518.

held by 'Umar b. al-Khaṭṭāb<sup>1</sup> and 'Abd Allāh b. 'Umar.<sup>2</sup> No Companions disagreed with such ruling except 'Abd Allāh b. Mas'ūd, 'Abd Allāh b. 'Abbās<sup>3</sup> and 'Abd Allāh b. Salām<sup>4</sup> who disapproved of such practice.<sup>5</sup> It is possible that the disapproval of such an act is to purify any qard transaction from all types of usury. Such usury happened when the creditor intended to gain some interests from the transaction. This was held by 'Umar b. al-Khaṭṭāb.<sup>6</sup>

b. 'Umar b. al-Khaṭṭāb disallowed any stipulation of any condition that the loan or debt was to be paid in a certain place other than the place where the loan or debt was made.<sup>7</sup> 'Abd Allāh b. 'Umar allowed no condition in loan or debt except the condition for its repayment only.<sup>8</sup>

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1. Mud., IV, p. 139; San., VIII, p. 142.
  2. Muw. Sh., p. 293; Muw. Y., p. 567; San., VIII, pp. 146-47.
  3. San., VIII, p. 143; Haz. M., VIII, p. 86.
  4. Haz. M., VIII, p. 86.
  5. Ath., p. 184 (835); Haz. M., VIII, p. 78.
  6. Cf. Mab., XIV, p. 35; Haz. M., VIII, p. 86.
  7. Muw. Y., p. 568; Mud., IV, p. 135.
  8. Muw. Sh., p. 293; Muw. Y., p. 568.



c. 'Abd Allāh b. 'Abbās ruled that the beneficiaries, in the case of inheritance, could withdraw or take their respective shares from a loan.<sup>1</sup>

d. 'Abd Allāh b. 'Umar was of the view that any loan reduction or rebate, after the borrower paid some of the loans earlier than a stipulated due date would amount to usury.<sup>2</sup> This was also the opinion of 'Umar b. al-Khaṭṭāb<sup>3</sup> and Zayd b. Thābit.<sup>4</sup> However, 'Abd Allāh b. 'Abbās considered it usury if the lender asked the borrower to give more money or price, after the latter had delayed the payment.<sup>5</sup>

e. Jābir b. 'Abd Allāh was of the opinion that no harm was done if the debtor repayed his debt in the form of foodstuffs or other goods.<sup>6</sup> 'Abd Allāh b. 'Umar allowed the lender to take the goods as the repayment of loan.<sup>7</sup>

f. According to Abū Hurayra, the solvent debtor who delayed the payment of debt at a specified time, is

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1. San., VIII, p. 289.

2. J. Ma., II, p. 60; Asl., pt. I, vol. I, pp. 206-07 (46); Muw. Sh., p. 271; Ath., p. 185 (840) and p. 186 (841).

3. Muw. Sh., p. 271.

4. Muw. Sh., p. 271; San., VIII, p. 71.

5. San., VIII, pp. 72-73.

6. Mud., IV, p. 137.

7. San., VIII, pp. 73-74.

considered as one who consumed ill-gotten property.<sup>1</sup>

This view is an extension of the order of the Prophet to any solvent debtor to pay his debt when the time of payment arrives.

### The Successors

The Successors continued to permit the practice of qard transactions. In relation to al-qard, they made the following extensive rulings:

i. Qatāda, al-Ḥasan al-Baṣrī and Sa'īd al-Musayyib allowed the repayment of loans in qard contract in greater quantity or better quality than the credited goods or money, without any prior condition<sup>2</sup> or intention of paying excess,<sup>3</sup> otherwise it amounts to usury. Al-Sha'bī prohibited such practice,<sup>4</sup> possibly to avoid practising usury. According to him<sup>5</sup> and 'Aṭā' b. Abī Rabāḥ<sup>6</sup> there is no harm, if the debtor gives such excess or gifts willingly or with his good will, or without any pre-condition.<sup>7</sup> Further, Muḥammad b. Sīrīn, Qatāda and Ibrāhīm al-Nakha'ī<sup>8</sup> forbade the creditor

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1. San., VIII, p. 317.

2. Ibid., pp. 145-46.

3. Haz. M., VIII, p. 78.

4. Ibid., p. 79.

5. San., VIII, p. 146.

6. Mud., IV, p. 139.

7. Mab., XIV, p. 37.

8. J. Ma., II, p. 75.

accepting gifts from the debtor. They considered such practice as receiving usury.<sup>1</sup> But Ibrāhīm al-Nakha'ī regarded receiving such a gift as lawful, if it is recognized that the people concerned have been accustomed to giving gifts before that.<sup>2</sup> However, Muḥammad b. Sīrīn, Qatāda and Ibrāhīm al-Nakha'ī disallowed any loan which draws profit.<sup>3</sup>

ii. Al-Ḥasan al-Baṣrī, Muḥammad b. Sīrīn,<sup>4</sup> Sa'īd b. al-Musayyib,<sup>5</sup> 'Umar b. 'Abd al-'Azīz,<sup>6</sup> al-Sha'bī and Shurayh<sup>7</sup> allowed the debtor to pay loans with goods, if the lender wanted him to pay them at earlier than the proposed date of repayment. In this case, the lender has no right to claim.

iii. According to al-Sha'bī and al-Ḥakam b. 'Uṭayba any claim of loan reduction or rebate made by the borrower, after he had paid some of the loans earlier than the stipulated due date, was not allowed.<sup>8</sup> Likewise, if the

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1. San., VIII, p. 145; Haz. M., VIII, p. 86.

2. San., VIII, pp. 142-43.

3. Ibid., p. 145.

4. Ibid., p. 71.

5. Ibid., p. 72.

6. Ibid., p. 73.

7. Ibid., pp. 74-75.

8. Ibid., p. 74.



lender proposed to rebate the loans, if the borrower paid earlier than the fixed date of repayment.

iv. Muḥammad b. Sīrīn was of the opinion that there is no harm if the payment of a loan is made, in a universally recognized way, in a place, other than the place where the contract has been made. Hence, it is considered a reprehensible practice (makrūh), if it is made in accordance with a prior condition.<sup>1</sup> This was also held by 'Aṭā' b. Abī Rabāḥ and al-Zuhrī.<sup>2</sup>

v. The beneficiaries of the deceased are respectively responsible to pay his debts from his property. This view was held by 'Aṭā' b. Abī Rabāḥ and al-Thawrī.<sup>3</sup> All his debts should be repaid immediately. This was held by Shurayḥ and Ibrāhīm al-Nakha'ī.<sup>4</sup> However, the acknowledgment of debts by the deceased is not accepted unless such acknowledgment or claim is supported by evidence. This was held by Shurayḥ and Ibrāhīm al-Nakha'ī.<sup>5</sup>

vi. Al-Sha'bī, Ibrāhīm al-Nakha'ī, al-Ḥasan al-Baṣrī,

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1. Haz. M., VIII, p. 78.

2. Mud., IV, p. 135.

3. San., VIII, p. 4.

4. Mud., V, p. 236.

5. Ibid., p. 213.

Qatāda<sup>1</sup> and Muḥammad b. Sīrīn<sup>2</sup> were of the opinion that all loans deferred or fixed in time will be dissolved when the debtor dies. But Ṭāwūs and Muḥammad b. Sīrīn considered the debtor's beneficiaries had to pay the loans, if they were entrusted to do so.<sup>3</sup> Al-Ḥasan al-Baṣrī, Qatāda<sup>4</sup> and Muḥammad b. Sīrīn<sup>5</sup> ruled that bankruptcy would also dissolve a loan fixed in time. In explaining such a loan, Ṭāwūs and Shurayḥ regarded a loan in trust or confidence as a loan fixed in time.<sup>6</sup>

vii. According to Ibrāhīm al-Nakha'ī, there is no harm to pay half of the debts before the specified time and the other half at the time.<sup>7</sup>

viii. Al-Sha'bī was of the opinion that a man is allowed to pay his debts by taking his children's property. But not vice versa.<sup>8</sup> However, according to Ma'mar b. Rāshid, the children, in this case, have the option to claim their property back when they reached majority in age.<sup>9</sup>

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1. San., VIII, p. 3; Haz. M., VIII, p. 85.

2. Tah. Adh., p. 19.

3. Ibid.

4. San., VIII, p. 3.

5. Tah. Adh., p. 19.

6. San., VIII, p. 3.

7. Ath., p. 185 (839).

8. San., VIII, p. 296.

9. Ibid.

ix. Anyone is not allowed to grant loans to others, except from what he has already owned or taken possession of. This was held by Sa'īd b. al-Musayyib.<sup>1</sup>

x. If the debtor dies and has left debts, which may be recognized between the debts of al-muḍāraba (dormant or sleeping partnership) and al-wadī'a (deposit), so the investors and depositors may claim back those debts as other creditors are allowed to claim their loans. This was held by Ibrāhīm al-Nakha'ī.<sup>2</sup>

xi. There was no harm to accept or to pay any payment of debts in the form of foodstuffs, silver or any other goods. This was held by al-Qāsim b. Muḥammad, Sālīm b. 'Abd Allāh, 'Umar b. 'Abd al-'Azīz and Sa'īd b. al-Musayyib.<sup>3</sup>

xii. 'Amr b. Dīnār ruled that the beneficiaries in the case of inheritance, could withdraw or take their respective shares from a loan.<sup>4</sup>

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1. Muw. Y., p. 562.

2. J. Ma., II, p. 74.

3. Mud., IV, p. 137.

4. San., VIII, p. 4.



II. Al-'āriyya (Loan of non-fungible objects or commodity  
or gratuitous loan, commodatum)

The definition of al-'āriyya

Literally al-'āriyya means what is taken by persons by turns. Al-'āriyya is defined as putting one in possession of the use of a thing without anything given in exchange,<sup>1</sup> or putting another temporarily and gratuitously in possession of the use of a thing, the substance of which is not consumed by its use.<sup>2</sup> In summary, al-'āriyya is the loan of a particular and identifiable piece of property.<sup>3</sup> The borrower may lend the borrowed object to a third party, but he must not hire it out or give it as a security. The owner may, at any time, demand the return of the object which he has lent, but he may become liable for damages.<sup>4</sup> This kind of loan is encouraged and recommended as a form of permissible and charitable deed.<sup>5</sup>

Pre-Islamic practice of al-'āriyya

Many temples or places of worship in Southern Arabia and other parts of the region lent their property to

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1. Lan., II, p. 2195.

2. Intro., p. 157.

3. C. Com., p. 24.

4. Cf. Um., IV, p. 37; Intro., p. 157.

5. Haz. M., IX, p. 168; Sab., III, p. 239.

anyone who needed them. These properties were the treasures of those temples which had been presented by worshippers and devotees. Land and cattle also belonged to those temples. Al-Ka'ba also had its own treasure, which had been lent to the people from time to time.<sup>1</sup> It may be suggested that this institution of lending had been the pre-Islamic foundation of al-'āriyya before the advent of Islam. Later, Islam developed and re-organized the regulations and procedures of this institution.

#### The legality of al-'āriyya

The legality of al-'āriyya was confirmed by the Qur'ān:

"But they refuse (to supply or lend)  
(even) neighbourly needs (al-mā'ūn)."<sup>2</sup>

According to 'Abd Allāh b. Mas'ūd and Sufyān al-Thawrī, al-mā'ūn is al-'āriyya. Further, according to 'Abd Allāh b. 'Abbās, Ibrāhīm al-Nakha'ī and Sa'īd b. Jubayr, al-Mā'ūn is the private or domestic property which is needed by neighbours or others for temporary use. This also implies al-'āriyya.<sup>3</sup>

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1. Muf., VII, p. 436.

2. Q., 107:7.

3. T.J., XXX, pp. 318-19.

The legality of al-‘āriyya was also confirmed by the Prophet. He is reported to have said:

"A guaranteed, ensured ‘āriyya (contract) must be returned to the lender<sup>1</sup> and the temporary grant or benefaction (al-minḥa) must be returned."<sup>2</sup>

It was reported that the Prophet had borrowed weapons from Ṣafwān b. Umayya and he had said:

"... An ‘āriyya must be returned (to the owner)."<sup>3</sup>

The conditions for al-‘āriyya

1. According to al-Shāfi‘ī, ‘āriyya contracts, whether riding animals, houses or cloth, should, essentially, be ensured or guaranteed. This view was

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1. Cf. Waq., II, p. 854; Amalī, p. 33; Um., III, p. 250.

2. Al-minḥa had been a pre-Islamic temporary grant which had been in the form of milking animals and the like. After their usufruction, they were returned to the owner. See Muf., VII, p. 405. The Prophet obliged the lender to return them after usufruction. See Amalī, p. 33.

3. Waq., II, p. 854; cf. IH. IV, p. 62.



held in accordance with the Tradition:<sup>1</sup>

"A guaranteed 'āriyya (contract)  
must be returned to the lender..."<sup>2</sup>

However, according to Ma'mar b. Rāshid, the Prophet borrowed or made two contracts of al-'āriyya with Ṣafwān b. Umayya, one of them with a guarantee and the other without a guarantee.<sup>3</sup> In another Tradition, the Prophet is reported to have said:

"An 'āriyya must be returned (to the  
owner)." <sup>4</sup>

In this Tradition, the Prophet did not mention any guarantee at all. The Traditions show that an 'āriyya transaction may be contracted with or without a guarantee. In this case, the second opinion is clear and it may be accepted.

ii. The return of goods in al-'āriyya is obligatory

The above Traditions all show that all objects lent in 'āriyya transactions should be returned obligatorily.<sup>5</sup>

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1. Um., III, p. 250.

2. Amalī, p. 33; Um., III, p. 250.

3. Cf. Waq., II, p. 85<sup>4</sup> and Ih., IV, p. 62; San., VIII, p. 180.

4. San., VIII, p. 181.

5. Amalī, p. 33; Niha., III, p. 320.

iii. Objects in 'āriyya contracts should be of some use and value

The precedent for this condition is the Prophet's Tradition:

"No one should prevent his neighbour from fixing a wooden peg in his own wall."<sup>1</sup>

This shows that the borrower should accept any object in the form of al-'āriyya, without any obligation, if it is useful to him. It therefore follows that the lender should give a useful object to a borrower.<sup>2</sup>

The Companions

As in other legal matters, the Companions followed the Prophet in their practice of al-'āriyya. Some of the conditions which were laid down by them were as follows:

i. Abū Hurayra and 'Abd Allāh b. 'Abbās were of the opinion that al-'āriyya should be guaranteed or ensured,<sup>3</sup> if the lender wishes.<sup>4</sup> In this case, Abū Hurayra stressed further that if any borrowed or loaned objects are damaged or lost, they have to be replaced

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1. Muw. Sh., p. 284; Muw. Y., p. 638.

2. Cf. Mab., XI, p. 133; cf. Kas., VI, p. 215; Sab., III, pp. 242-43.

3. Um., III, p. 250.

4. San., VIII, p. 180.

by the borrower.<sup>1</sup> Such liability may be incurred when a transgression is perpetrated by the borrower. In the case of dispute between the lender who claims that he has rented the object, instead of lending it, the claim of the borrower is to be accepted, provided he gives an oath, that he has borrowed it and not rented it.<sup>2</sup>

ii. 'Umar b. al-Khaṭṭāb considered al-'āriyya as having the same status as al-wadī'a (deposit); no replacement is involved in it except when a transgression has occurred.<sup>3</sup> In this matter, 'Alī b. Abī Ṭālib added that there was no liability or guaranty in 'āriyya transaction.<sup>4</sup> 'Abd Allāh b. Mas'ūd opined that there was no liability in 'āriyya transaction, if any damage occurred in the hands of the borrower.<sup>5</sup> According to 'Alī b. Abī Ṭālib, al-'āriyya is not a sale.<sup>6</sup> This was generally recognized except when a breach of contract or a transgression happened, and then the borrower was obliged to replace the loaned object.<sup>7</sup>

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1. Um., III, p. 250; San., VIII, p. 180; Haz. M., IX, p. 170.

2. Um., III, p. 250.

3. San., VIII, p. 179; Haz. M., IX, pp. 170 and 173.

4. San., VIII, p. 179; Haz. M., IX, p. 173.

5. Mab., XI, p. 134.

6. Haz. M., IX, p. 173.

7. Ibid.



iii. The return of goods in al-‘āriyya is obligatory

Mu‘ādh b. Jabal emphasized that the order of the Prophet must be followed, in the case of al-‘āriyya saying that, "Al-‘āriyya must be returned to the lender (al-‘āriyya mu‘addāt)."<sup>1</sup>

iv. On the subject of objects in ‘āriyya contracts being of some use and value

Abū Hurayra commented on the above Tradition<sup>2</sup> that the man should accept the help of his neighbour to fix a wooden peg in his wall,<sup>3</sup> because such an act has some use and value. Otherwise, such an act is not worth accepting. In addition, in this case, the owner of an ‘āriyya contract is recommended to lend property of some use and value to the borrower.<sup>4</sup>

v. Abū Ḥanīfa and al-Shaybānī regarded the contract of granting al-suknā (a lent dwelling place) as an ‘āriyya, which will be returned to the owner, or to his beneficiaries, after the death of the lodger. In this case, ‘Abd Allāh b. ‘Umar inherited the house of Ḥafṣa bt. ‘Umar. Ḥafṣa had given lodging to the daughter of Zayd b. al-Khaṭṭāb for as long as she lived. When the daughter of Zayd died, ‘Abd Allāh took possession of the dwelling

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1. Haz. M., IX, p. 170.

2. Muw. Y., p. 638; supra chapter VI, p. 339.

3. Muw. Y., p. 638.

4. Sab., III, pp. 241-42.

and considered that it was his.<sup>1</sup> This means that the contract of al-suknā is the contract of al-‘āriyya. The above account was the precedent for this legal view which was practised by the Companions.

### The Successors

The Successors, following the Companions, continued to hold the practice of al-‘āriyya legal and made further rulings on the subject, in formulating a complete set of regulations on it. Some of their rulings are as follows:

i. There is no liability on a reliable borrower (al-musta‘īr) who has been accused of exploitation. This was held by Shurayh.<sup>2</sup> Further, he ruled that there was no liability on the borrower who had borrowed land to build a building to an indefinite time, then he was ousted by the lender. In this case, the latter was liable to pay for such an act.<sup>3</sup> Ibrāhīm al-Nakha‘ī added that there was no liability on either borrower in an ‘āriyya contract, and depositary, except when any infringement or misdemeanour had occurred.<sup>4</sup> This was also held by al-Sha‘bī<sup>5</sup> and ‘Umar b. ‘Abd al-‘Azīz.<sup>6</sup>

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1. Muw. Sh., p. 288; Muw. Y., p. 647.

2. San., VIII, pp. 178-79; Daraq., III, p. 41.

3. Ikhtilaf, p. 104.

4. J. Ma., II, p. 75; San., VIII, p. 179.

5. San., VIII, pp. 179-80.

6. Haz. M., IX, p. 173.

Qatāda was of the opinion that there is no liability on the borrower, except when the parties have made a prior condition for it.<sup>1</sup>

ii. Any payment, reimbursement or rent,<sup>accruing</sup> from borrowed goods by the borrower, in the contract of al-‘āriyya, belongs to the lender. This was held by al-Sha‘bī.<sup>2</sup> But according to al-Hakam b. ‘Utayba it belongs to the borrower.<sup>3</sup>

iii. Following the injunction which had been established by the Prophet, Shurayh and Ṭawūs were of the opinion that any goods of an ‘āriyya contract must be returned to the lender.<sup>4</sup> This was also held by Masrūq, ‘Aṭā’ b. Abī Rabāh, ‘Umar b. ‘Abd al-‘Azīz and Sulaymān b. Yasar.<sup>5</sup> Further, al-Sha‘bī considered al-‘āriyya as similar in status to a debt or pecuniary obligation (dayn),<sup>6</sup> in the case of payment or returning and liabilities.

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1. Haz. M., IX, p. 170.

2. San., VIII, p. 180.

3. Ibid.

4. Ibid., p. 181.

5. Haz. M., IX, p. 170.

6. San., VIII, p. 182.



### III. Al-wadī'a (Deposit)

#### The definition of al-wadī'a

Legally, al-wadī'a is a thing or commodity committed to the trust and care of a person; a trust; a deposit.<sup>1</sup> In other words, al-wadī'a or the deposit is the commission given by the depositor (al-mūdi' or al-mustawdi') to the depositary (al-mūda' or al-mustawda') for holding his property in safe custody;<sup>2</sup> it is a fiduciary relationship or trusteeship (amāna). This safekeeping must be assured by the depositary himself or by a member of his family. Refusal to return the deposit, by the depositary, denial that a deposit exists, or its confusion with the depositary's own property are acts which amount to usurpation and entail liability; other kinds of "transgression" (ta'addī), particularly using the deposit, entail liability too. The effects of these other kinds of ta'addī in the case of a deposit are different from those in the cases of hire and lease and of the loan of non-fungible objects; in the case of a deposit, liability ceases when the ta'addī ceases, but in the case of the other contracts it continues until the termination of the contractual relationship.<sup>3</sup>

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1. Lan., II, p. 3051.

2. Cf. Otto Spies, EI<sup>1</sup>, vol. IV, p. 1079.

3. Intro., p. 157.

Al-Shāfi'ī considers al-wadī'a to mean al-'amāna (deposition in trust or trusteeship)<sup>1</sup> and derives the term from the verse of the Qur'ān:

"And if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him fear his Lord."<sup>2</sup>

The view of al-Shāfi'ī was, possibly, supported by the Tradition of the Prophet:

"He who has a deposition in trust or pledge ('amāna) let him return it to him who entrusted him with it."<sup>3</sup>

The above Qur'ānic verse<sup>4</sup> and the Tradition are an indication of how little and how reluctantly the pre-Islamic Arabs fulfilled their obligations and agreements they had entered upon.

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1. Um., IV, p. 142.

2. Q., 2:283. See also Q., 4:58; 23:8; and 70:32.

The Prophet said:

"Whoever is deposited (by others) a deposit, he is not responsible for any liability."

See 'Abd Allāh Muḥammad b. Yazīd, al-Qazwīnī Ibn Māja, Sunan, ed. Muḥammad Fu'ād Abd al-Bāqī, II (Cairo, n.d.), p. 802

3. IH., IV, p. 185; Watha'iq, p. 307.

4. Otto Spies, EI<sup>1</sup>, vol. IV, p. 1080.

The origin, pre-Islamic practice and legality of al-wadī'a

It was reported that the Prophet told 'Alī b. Abī Tālib about his departure or emigration to Medina and he ordered 'Alī to stay behind in Mecca in order to return goods which men had deposited as deposits (al-wadā'i') with the Prophet; for anyone in Mecca who had property which he was anxious about left it with the Prophet because of his well-known honesty and trustworthiness.<sup>1</sup> This report suggests that al-wadī'a was possibly practised before Islamic times among the Arabs and that it was lawfully practised and endorsed by the Prophet.

The conditions for al-wadī'a

i. If the deposited object has been damaged, not because of the consignee's or depositary's (al-mūda') transgression or negligence, then the consignee is not liable to replace it. In this case he is considered as having kept and treated the object well.<sup>2</sup> The Qur'ān emphasises this matter, saying:

"No ground (of complaint) can there  
be against such as do right."<sup>3</sup>

The Prophet is reported to have said in a Tradition:

"Surely, your blood and your property  
are sacrosanct."<sup>4</sup>

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1. IH., II, p. 93.

2. Haz. M., VIII, p. 277.

3. Q., 9:91.

4. IH., IV, p. 185.



According to Ibn Ḥazm, this Tradition shows that it is forbidden or unlawful for the property of a depositary to be taken by others, as long as no liability was imposed on him.<sup>1</sup>

ii. According to Ibn Ḥazm, any transgression (ta'addī) by a consignee or depositary (mūda') involving neglect or damage of the deposited object, renders the consignee liable to replace the object. He is liable to replace as much as the damaged object.<sup>2</sup> This condition was made in the Qur'ān:

"If anyone transgresses the prohibition  
against ye transgress likewise against  
him."<sup>3</sup>

iii. The statement of a depositary regarding damage done to a deposited object, which has been returned to its owner or handed over to some person specified by the owner will be accepted, whether with evidence or otherwise, if this statement is coupled with an oath. Decisions made about the depositary's property are inviolable and as the defendant he is not liable to any indemnity or compensation. In such cases, the Prophet is reported to have decided that the plaintiff should

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1. Haz. M., VIII, p. 277.

2. Ibid.

3. Q., 2:194.

take an oath in support of his claim, before it could be accepted.<sup>1</sup>

The above conditions were the rudimentary legal foundations laid down by the Prophet.

### The Companions

The Companions followed the Prophet in the practice of al-wadī'a. They set the conditions as they had been stipulated by the Prophet. These conditions were:

i. 'Alī b. Abī Ṭālib and 'Abd Allāh b. Mas'ūd were of the opinion that the depositary was regarded as a trustee (amīn). He was not liable to replace the deposited object except where a breach of faith or deception (khiyāna) had been involved;<sup>2</sup> according to 'Umar b. al-Khaṭṭāb, if the object was damaged without there being any transgression or negligence on the part of the depositary, he is not liable to replace it.<sup>3</sup>

ii. 'Umar b. al-Khaṭṭāb and Anas b. Mālik agreed that the depositary or consignee (al-mūda' or al-mustawda') was liable to replace the deposited object, if it suffered damage while in his hands.<sup>4</sup> This ruling

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1. Haz. M., VIII, p. 277.

2. San., VIII, p. 182.

3. Haz. M., VIII, p. 277; Mab., XI, p. 109.

4. San., VIII, p. 182.

indicates that any negligence also renders the depositary responsible to replace the object.

iii. 'Abd Allāh b. 'Umar was of the opinion that, if the depositary used the deposited money, especially when he was trusted to transfer such money to a third party in another place, for business transactions, without any agreement of al-qirāḍ or al-muḍāraba, any profit from it was to be returned to the depositor (al-mūdi' or al-mustawdi'). Further, the depositary was considered as a surety (ḍāmin) and he had to replace the goods if any damage of goods in such business transactions occurred.<sup>1</sup> According to al-Shāfi'ī, in this case the depositary was regarded as a transgressor ~~not~~ of the contract.<sup>2</sup>

### The Successors

The practice of al-waḍī'a was also continued by the Successors. They made extensive rulings as follows:

1. According to Shurayḥ, there is no liability on the reliable depositary (al-mustawda') who is accused of exploitation.<sup>3</sup> Ibrāhīm al-Nakha'ī added that there is no liability on the depositary, except when infringement or misdemeanour has occurred.<sup>4</sup> This was also held by

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1. Cf., Um, IV, p. 35.

2. Ibid.

3. San., VIII, pp. 178-79; Daraq., III, p. 41;  
Haz. M., IX, p. 170.

4. San., VIII, p. 179.



al-Sha'bī<sup>1</sup> and 'Umar b. 'Abd al-'Azīz.<sup>2</sup>

ii. If the deposited goods have been lost from the hands of the depositary (al-mūda' or al-mustawda'), the depositor (al-mūdi' or al-mustawdi') is allowed to recover or reclaim them from the depositary, and the latter should claim an amount less than the original deposit or as agreed by the parties, if he does not suspect or accuse the depositary of any criminal act. This was held by Shurayh.<sup>3</sup>

iii. The depositary is liable to replace the deposited goods if he has deposited them with another depositary, without the permission of the first depositor. This was the view of Shurayh.<sup>4</sup>

iv. According to al-Sha'bī, al-wadī'a is like a debt,<sup>5</sup> in accordance with the law. Ibrāhīm al-Nakha'ī considered al-wadī'a as a debt, and it should be solved like debt, if it is not possible to distinguish between the deposit and the debt, in the hands of the depositary.<sup>6</sup> According to Ibrāhīm al-Nakha'ī and 'Aṭā' b. Abī Rabāh.<sup>7</sup>

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1. San., VIII, pp. 179-80.

2. Haz. M., IX, p. 173.

3. San., VIII, pp. 181-82.

4. Ibid., p. 182.

5. Ibid., pp. 182-83.

6. Ibid., p. 183.

7. Um., IV, p. 144; Ikhtilaf, p. 24.

and Hammād b. Abī Sulayman,<sup>1</sup> if the depositary dies and he leaves a deposit and he is also liable to pay debt, should it not be possible to distinguish between deposit and debt, such left property should be allotted or divided and given to anyone who claims it.

v. If anyone claims that he has deposited goods with a depositary, and the latter acknowledges it but later, the latter claims that <sup>أخرى</sup> another person has deposited them, Such goods should be given to the former and the latter is also indebted to pay the second depositor. This was held by al-Thawrī.<sup>2</sup>

vi. According to al-Ḥasan al-Baṣrī, the depositary is liable to replace the deposited goods, if he has violated the agreement, but he is entitled to acquire that excess remaining from goods which he has replaced to the depositor. However, Ibrāhīm al-Nakha'ī forbade the depositary from taking such excess goods.<sup>3</sup>

vii. Al-Ḥasan al-Baṣrī and Ṭāwūs were of the opinion that anyone who acknowledges or claims whatever is in his hands of the deposited goods, <sup>such statement</sup> will be accepted.<sup>4</sup>

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1. San., VIII, p. 183.

2. Ibid.

3. Ibid.

4. Ibid., pp. 183-84.

According to al-Ḥasan al-Baṣrī, any statement of the depositary that he has returned the deposited goods is accepted, even though such a claim is without any evidence.<sup>1</sup> Such a ruling is to safeguard the integrity of a depositary from any injustice by the depositor.

viii. Ibn Abī Laylā was of the opinion that the depositary is liable to replace the deposited goods if he takes the goods from the sealed wrapping.<sup>2</sup>

#### IV. Al-ḥajr (Interdiction)

The definition of al-ḥajr and its practice in pre-Islamic times

Literally, al-ḥajr means restriction or limitation (al-taḍyīq), prevention or preclusion (al-manʿ).<sup>3</sup> Legally, al-ḥajr implies the prevention, limitation or interdiction of a person from the right of disposal and usufruction of his property.<sup>4</sup> The term of al-ḥajr refers both to the act of imposing al-ḥajr and the status of this act. Slaves and minors normally have al-ḥajr status. Insane people and small children necessarily have such status. Such a ruling about the status of al-ḥajr is essential so that the idhn (i.e. permission or extension

1. San., VIII, p. 184.

2. Ibid.

3. Schacht, EI<sup>2</sup>, vol. III, p. 50; Sab., III, p. 566.

4. Niha., I, p. 342; Lis., IV, p. 167; Tahanawi, II p. 29; Schacht, EI<sup>2</sup>, vol. III, p. 50; cf. Lan., I, p. 516.



of the right to dispose of property) granted by an authority may be annulled.<sup>1</sup> Any transactions entered into by such a person will be considered as ipso facto void, if such transactions are disadvantageous to him, or at least subject to ratification by his guardian, such as in case of sale.<sup>2</sup>

In pre-Islamic times, the bankrupt businessmen would be declared bankrupt and were responsible to repay their debt in accordance with agreements agreed between them and their creditors.<sup>3</sup> It appears that there was no institution or doctrine of al-ḥajr during these times. The institution of al-ḥajr was purely Islamic and it was introduced by the Prophet.

1. Al-ḥajr on the bankrupt (al-muflis) and selling his property

In the case of al-taflīs (bankruptcy), al-ḥajr may be imposed on al-muflis,<sup>4</sup> as a restriction on the right

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1. Intro., p. 126.

2. Cf. Intro, p. 126; C. Com., p. 34.

3. Muf., VII, pp. 436-37.

4. According to al-Zurqānī, al-muflis, literally, means a person who has neither objects of material value, i.e. corporeal nor personal capital assets or substance and corpus of property (ʿayn), nor goods or merchandise (ʿarḍ). Legally, al-muflis is a man who has insufficient property readily available to cover the whole total of debts, which he is held responsible to pay. See Zur., III, p. 330.

of others. The purpose of this type of al-hajr is to restrict al-muflis in the right of disposal of his property for safeguarding and protecting the right of creditors and for preventing him from carrying out transactions detrimental to his creditors.<sup>1</sup> The precedent, for such a regulation, was set by the Prophet. In the Tradition, Mu'adh b. Jabal was a generous man, young, handsome, the best man among the youth of his fellow tribesmen. He always gave his possessions away. He was always in debt and the whole of his property was not more than the balance of his unpaid debts. So, he came to the Prophet and requested the latter to ask his creditors to withdraw their claims on the debts. They, however, refused. The Prophet, later, sold all Mu'adh's property to pay the debts, so that he had nothing left.<sup>2</sup> In relation to al-muflis, the Prophet made several injunctions. They are:

a. Other's property with al-muflis (the bankrupt)

If a person finds his property with al-muflis, various possible ways of paying the debts exist. Those solutions are as follows:

i. If he finds his property in the form of capital assets

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1. Kas., VII, p. 169; Sab., III, p. 567.

2. Mud., V, p. 232; San., VIII, pp. 268-69.

with al-muflis, he will be more entitled to such property than all of the creditors. In this case, the Prophet is reported to have said:

"If anyone goes bankrupt, and a man finds his own property intact with him, he is more entitled to it than anyone else."<sup>1</sup>

And the Prophet is reported to have said:

"A man who sells the wares to another man without cash, then the latter goes bankrupt and the former finds his wares intact, he should take them, not (other) creditors."<sup>2</sup>

ii. When the purchaser dies, and the seller has not accepted the price and the seller later finds the goods, he has the same right to them as others. There is no difference between the case of death and bankruptcy. The Prophet is reported to have stated the basic rule for such cases, saying:

"Whenever a man sells wares and then the buyer becomes bankrupt and the seller has not taken any of the price and he finds some of his property intact with

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1. Muw. Y., p. 565; Um., III, p. 203; San., VIII, pp. 264-65.
  2. San., VIII, p. 266.



the buyer, he is more entitled to it than anyone else. If the buyer dies, then the seller is the same as other creditors with respect to it."<sup>1</sup>

b. No interdiction (al-ḥajr) on the impoverished  
(al-mu'sir)

Al-ḥajr is imposed on a man who becomes bankrupt but who does not appear to be living in straitened circumstances. This was held by Abū Ḥanīfa, Mālik and al-Shafi'ī.<sup>2</sup> If, however, he appears to be in an impoverished situation, no detention (ḥabs) or restriction (ḥajr) can be made on him. The creditors cannot pursue their claims on debts from bankrupt debtors until the latter's ease or prosperity and affluence (maysara) is established.<sup>3</sup> In support of such a regulation, it was mentioned in the Qur'ān:

"If the debtor is in a difficulty,  
grant him time till it is easy for  
him to repay."<sup>4</sup>

In pre-Islamic times, a bankrupt debtor who had not been able to pay his debts would have been sold as a

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1. Muw. Sh., p. 278; Muw. Y., p. 565; San., VIII, p. 264.
  2. Jam., III, p. 373.
  3. Cf. T.J., III, pp. 112-13.
  4. Q., 2:280.

slave to cover his debts. This practice was abrogated by the above verse.<sup>1</sup>

2. Al-hajr on the incompetent (al-safīh)<sup>2</sup>

An interdiction should be made on the major incompetent or one who is weak of understanding, i.e. ignorant (jāhil),<sup>3</sup> or who is to be put under guardianship,<sup>4</sup> because of his incompetency,<sup>5</sup> imbecility and wasting and mismanaging his property (sū' tadbīr mālih).<sup>6</sup> In this case, it is mentioned in the Qur'ān that:

"To those weak of understanding make not over your property, which God hath made a means of support for you."<sup>7</sup>

And:

"If the party liable is mentally deficient, or weak, or unable himself to dictate, let his guardian dictate faithfully."<sup>8</sup>

The Prophet is reported to have said:

"It is not allowed (or it is not valid),

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1. Jam., IV, p. 371.

2. According to Coulson, al-safīh is the prodigal. See C. Com., p. 35.

3. Lis., XIII, pp. 498-99.

4. Jam., V, p. 30.

5. Um., III, p. 223.

6. T.J., IV, p. 247; cf. Intro., p. 124.

7. Q., 4:5.

8. Ibid., 2:282.

for al-ma'tūh (the idiot or the deficient) to divorce, to sell and to purchase."<sup>1</sup>

3. Al-ḥajr on the minor (al-ṣaghīr)

The minor, as the major incompetent, is to be put under guardianship. He is not allowed to administer his property or to enter into a contract of any sort except to conclude certain advantageous transactions such as to accept donations and gifts.<sup>2</sup> So that, by such interdiction, his property should be protected from being lost or destroyed. According to al-Shāfi'ī, such guardianship of the minor lapses when the person concerned fulfils two conditions:

- i. When the minor has attained and reached the age of puberty, sui juris.
- ii. When maturity of the mind or sound judgment is found in the minor.<sup>3</sup>

In these two conditions, it is stated in the Qur'ān:

"Make trial of orphans until they reach the age of marriage, if then ye find sound judgment in them, release their property to them."<sup>4</sup>

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1. J. Ma., II, p. 40.

2. Intro., p. 125.

3. Um., III, p. 220; cf. C. Conf., p. 25.

4. Q., 4:6.



Majority is established by the appearance of one of its several signs:

- i. Emission of semen (al-imnā'), whether in wakefulness or sleep. It is stated in the Qur'ān:

"And when the children among you come of age, let them (also) ask for permission, as do those senior to them (in age)."<sup>1</sup>

In a Tradition, the Prophet is reported to have said:

"The ductus or pen (of God) (al-qalam) is lifted from three (persons). From a person who is asleep until he is awake, from an insane person till he recovers or recuperates and from a child until he is sexually mature or pubescent."<sup>2</sup>

The Prophet is also reported to have said:

"No orphanhood after puberty."<sup>3</sup>

- ii. Completion of fifteen years of age,<sup>4</sup> as the recognized limit for guardianship of property (curatio), if no other signs of puberty are discerned. In this case, 'Abd Allāh b. 'Umar, Usāma b. Zayd<sup>and</sup> Zayd b. Thābit

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1. Q., 24:59.

2. J. Ma., II, p. 40.

3. Ibid., p. 39.

4. Cf. C. Conf., pp. 25-26.

~~Some~~ offered themselves to the Prophet (to engage in the battle) when they ~~were~~ fourteen years old, on the day of the battle of Uhud, but the Prophet rejected their offer. Later, they offered themselves <sup>again</sup> to the Prophet on the day of the battle of al-Khandaq (the ditch), when they were fifteen years old and the Prophet accepted their offer to join the ranks.<sup>1</sup>

The guardian and the management of property

a. The guardian can use the property of an orphan

Any guardian is allowed to use the property of an orphan, who is under his guardianship, for the former's daily maintenance. It is advised that such use should be moderate. It is stated in the Qur'ān:

"If the guardian is well-off, let him claim no remuneration, but if he is poor, let him have for himself what is just and reasonable."<sup>2</sup>

b. The maintenance of the minor

All maintenance of a minor is provided by the guardian out of the former's property. Such a practice should be continued until the minor reaches the age of maturity and is of sound mind or he has attained the quality of prudent judgment. For this case, it is

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1. Waq., II, p. 453; IH., III, p. 18; IS., IV, p. 143.

2. Q., 4:6.

stated in the Qur'ān:

- i. "To those weak of understanding, make not over your property, which God hath made a means of support for you, but feed and clothe them therewith, and speak to them words of kindness and justice."<sup>1</sup>
- ii. "Make trial of orphans until they reach the age of marriage; if then ye find sound judgment in them, release their property to them; but consume it not wastefully, nor in haste against their growing up."<sup>2</sup>

#### The Companions

The permissibility of al-ḥajr was recognized by the Companions. Such al-ḥajr should be imposed on anyone who has been declared legally incompetent to deal in business. This was the opinion of 'Abd Allāh b. 'Abbās.<sup>3</sup>

#### 1. Al-ḥajr on the bankrupt (al-muflis) and confiscation of his property

- a. 'Umar b. al-Khaṭṭāb held the view that all properties of a bankrupt debtor should be confiscated and they <sup>should be</sup> given to

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1. Q., 4:5.

2. Ibid., 4:6.

3. Haz. M., VIII, p. 285.



his creditors.<sup>1</sup> But 'Alī b. Abī Ṭālib detained the debtors,<sup>2</sup> who failed to pay the debts.

b. Others' property with al-muflis (the bankrupt)

If a creditor finds his property with al-muflis, the solutions for payment of his debts are as follows:

i. 'Alī b. Abī Ṭālib<sup>3</sup> and 'Uthmān b. 'Affān<sup>4</sup> were of the opinion that, if the creditor finds his property in the form of capital assets with al-muflis, he would be more entitled to such property, even though he has been paid some of the debts before al-muflis went bankrupt. In this case, al-Zubayr b. al-'Awwām and Abū Hurayra were of the opinion that the creditor would also be more entitled to a deceased debtor's property, than any of the others.<sup>5</sup> But 'Alī b. Abī Ṭālib considered the creditor, in this case, is in the same position as other creditors.<sup>6</sup>

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1. Mud., V, p. 233; San., VIII, pp. 268-69.

2. San., VIII, p. 306.

3. Ibid., p. 266.

4. Daraq., III, pp. 31-32; Haz. M., VIII, p. 176.

5. Haz. M., VIII, p. 176.

6. Huj., II, p. 716; San., VIII, p. 266; Haz. M., VIII, p. 176.

c. No interdiction on al-muflis to do business

'Uthmān b. 'Affān, the Caliph, did not interdict and declare 'Abd Allāh b. Ja'far (a bankrupt man), a partner of a wealthy man al-Zubayr b. al-'Awwām, as legally incompetent to deal in business, after a request by 'Alī b. Abī Tālib to do so.<sup>1</sup> This indicates that a person who has gone bankrupt, is allowed to get involved in any business contract or transaction when his partner is a wealthy person. The public authorities cannot interdict and declare him legally incapable or incompetent in a business contract.

d. No interdiction (al-ḥajr) on the impoverished (al-mu'sir)

If a debtor appears to be in impoverished circumstances, no detention (ḥabs) or interdiction (ḥajr) can be made on him. The creditors cannot pursue their claims on debts from impoverished debtors until the latter's ease or prosperity and affluence (maysara) is established. This was the view of Abū Hurayra.<sup>2</sup> According to Abū Bakr al-Ṣiddīq and 'Umar b. al-Khaṭṭāb, the establishment of impoverishment should be made by an oath.<sup>3</sup>

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1. San., VIII, pp. 267-68.

2. Jam., III, p. 372.

3. Mud., V, p. 205.

But 'Abd Allāh b. 'Abbās was of a different opinion. According to him, the verse,

"If the debtor is in a difficulty,  
grant him time till it is easy  
for him to repay,"<sup>1</sup>

refers specifically to usury only. Time for payment may not be granted in case of all debt and other business transactions. Their payment is to be executed by the debtor, and in case of his incapacity to do so, he will be detained for such offence till he is able to pay it.

'Abd Allāh b. 'Abbās based his view<sup>2</sup> on the verse,

"God doth command you to render back  
your trusts to those to whom they  
are due."<sup>3</sup>

## 2. Al-hajr on the incompetent (al-safīh)

'Umar b. al-Khaṭṭāb considered al-sufahā' (singular al-safīh) as ignorant people who do not know the law.<sup>4</sup> However, Abū Mūsā al-Ash'arī regarded al-sufahā' as persons who are justly liable to be interdicted.<sup>5</sup> But the latter's view was a general interpretation.<sup>6</sup> 'Abd Allāh b. 'Abbās included an elderly person who has unsound mind as al-safīh as well.<sup>7</sup> According to Abū Mūsā al-Ash'arī and

1. Q., 2:280.

2. Jam., III, p. 372.

3. Q., 4:58.

4. Jam., V, p. 328.

5. Cf. T.J., IV, p. 247; Jam., V, p. 28.

6. Haz. M., VIII, p. 285.

7. Jam., V, p. 28.



'Abd Allāh b. 'Abbās the property of al-sufahā' will be given to them by the guardians, whenever they need it,<sup>1</sup> for the purpose of maintaining them in accordance with the law. Such maintenance will not be given excessively.<sup>2</sup>

'Abd Allāh b. 'Abbās added that a husband is not expected to give all of his property except the obligatory subsistence to his wife and children, if he is poor. In this case, he is allowed to save some property for his own maintenance and livelihood. In such a situation the women, i.e. the wives, and their small children are considered to be incompetents (al-sufahā).<sup>3</sup> In addition, 'Umar b. al-Khaṭṭāb did not interdict a squanderer or wastrel (al-mubazzir) who had dissipated his property or wealth by extravagant expenditure and had wasted it.<sup>4</sup>

### 3. Al-ḥajr on the minor (al-ṣaghīr)

A minor is to be put under guardianship until he has attained puberty and sound judgement. In relation to the Qur'ānic verse,

"If then ye find sound judgment in them,  
release their property to them,"<sup>5</sup>

'Abd Allāh b. 'Abbās was of the opinion that the gaining

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1. Jam., V, p. 29.

2. Ibid.

3. Ibid.

4. Haz. M., VIII, p. 297.

5. Q., 4:6.

of sound judgment by a minor means the attainment of propriety in the faculty of reason, comprehension and intelligence and in supervising, safeguarding and protecting his property.<sup>1</sup> Al-waṣī (the executor, i.e. the legal guardian) is allowed to trade the property of his ward, i.e. the minor, to invest it for his ward's benefit. This was held by 'Umar b. al-Khaṭṭāb and 'Ā'isha.<sup>2</sup>

On the question of the signs of majority, 'Umar b. al-Khaṭṭāb considered that the growing of hair, i.e. moustache or beard, is one of the signs of majority. A person is, in such a case, liable to pay al-jizya (the capitation tax on free non-Muslim subjects living in an Islamic state).<sup>3</sup> 'Uthmān b. 'Affān also regarded the growing of hair as a sign of majority and whoever is found to be in such circumstances is punishable under the ḥudūd (singular ḥadd, fixed punishments) regulations. The above identification is an alternative sign of majority, apart from emission of semen, when the real age is not known and a denial is involved.<sup>4</sup> 'Abd Allāh b. 'Umar was of the opinion that the trusteeship (al-amāna) is given to a minor when his hair has grown.<sup>5</sup>

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1. Abū Bakr Aḥmad b. 'Alī al-Jaṣṣās, Aḥkām al-Qur'ān, II (Cairo, 1347 A.H.), p. 76; Haz. M., VIII, p. 285; Jam., V, p. 37.
  2. M. in Um., VIII, p. 187.
  3. Jam., V, p. 35.
  4. Ibid.
  5. J. Ma., II, p. 39.

Nevertheless, the emission of semen is regarded as the real sign of majority. This was held by Abū Bakr al-Ṣiddīq,<sup>1</sup> the Caliph.

The guardian can use the property of an orphan

Any guardian is permitted to use the property of an orphan, who is under his guardianship, for the former's daily maintenance. 'Ā'isha commented on the verse,

"But if he is poor, let him (the guardian) have for himself what is just and reasonable"<sup>2</sup>

that the verse was revealed to allow the guardian to use moderately, from the property of an orphan, if the former needed to do so on account of his daily maintenance.<sup>3</sup>

According to her, in this case, no repayment is obliged on the poor executor because that is his right on account of duties as guardian.<sup>4</sup>

On the question of al-akl bi al-ma'rūf (use in a just and reasonable way), 'Umar b. al-Khaṭṭāb<sup>5</sup> and 'Abd Allāh b. 'Abbās considered such a use as a loan (qard) if the guardian was in need. He is, however, obliged to pay it back whenever he is well off.<sup>6</sup> 'Abd Allāh b.

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1. Khar., p. 107.

2. Q., 4:6.

3. T.J., IV, p. 260; Jam., V, p. 41.

4. T.J., IV, p. 260.

5. T.J., IV, p. 255.

6. T.J. IV, pp. 255 and 256; Abū Bakr Aḥmad b. 'Alī, Al-Jaṣṣās, op. cit., II, p. 77; cf. Haz. M., VIII, p. 328; Jam., V, pp. 41-42.



‘Abbās emphasized that such use is permissible when the guardian is in absolute need of it for maintaining himself.<sup>1</sup> In the case of al-akl bi al-ma‘rūf, ‘Abd Allāh b. ‘Abbās elaborated that such use is the usufruction from the property of an orphan. This includes the milk of livestock or the riding of animals, as long as such usufruction does not damage the principal or basic property. According to him, even a mandatory executor or an authorised executor (al-waṣī) is not permitted to take the primary or principal property of an orphan.<sup>2</sup> Further, ‘Abd Allāh b. ‘Abbās commented on the verse,

"If the guardian is well-off, let him claim no remuneration, but if he is poor let him have for himself what is just and reasonable,"<sup>3</sup>

that the authorised executor (guardian) should take for himself what is just and reasonable from his property so that he does not need to take from the property of an orphan. Therefore, let the well-off claim no remuneration and let the poor live in straitened circumstances, until he does not need to consume such property.<sup>4</sup> Further,

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1. Jam., V, p. 43.

2. T.J., IV, p. 258; Jam., V, p. 42.

3. Q., 4:6.

4. Jam., V, p. 43.

‘Abd Allāh b. Mas‘ūd did not allow the guardian to use the property in any circumstances.<sup>1</sup> ‘Umar b. al-Khaṭṭāb, nevertheless, allowed the guardian to borrow some property from the property of an orphan under his guardianship.<sup>2</sup>

On the verse,

"When ye release their property to them,  
take witnesses in their presence,"<sup>3</sup>

‘Umar b. al-Khaṭṭāb commented that testimony with witnesses should be made by the authorised executor should he want, while prosperous or affluent, to return property which he has borrowed from the property of an orphan, when he was impoverished.<sup>4</sup>

#### The maintenance of the minor

Minors are maintained by the authorised guardian out of their property. Such maintenance should be made until they have attained propriety in their faculty of reasoning and safeguarding their property. This was the opinion of ‘Abd Allāh b. ‘Abbās.<sup>5</sup> According to him, in such cases, the guardian is not allowed to take the opportunity to use the property of an orphan (minor) wastefully or hastily in anticipation of his growing up.<sup>6</sup>

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1. J. Ma., II, p. 72.

2. Haz. M., VIII, p. 324.

3. Q., 4:6.

4. Jam., V, p. 45.

5. Ibid., p. 37.

6. Ibid., p. 41.

### The Successors

The Successors recognized the legality of al-ḥajr and developed the juridical theory and practice of this subject, by giving extensive rulings to widen its applicability. Those rulings were:

1. Al-ḥajr on the bankrupt (al-muflis) and selling of his property

Al-ḥajr may be imposed on al-muflis, as a restriction on the right of others, ~~and~~ not allowing him the right of disposal of his property. Such a restriction is to protect the right of creditors.<sup>1</sup> According to Ma'mar b. Rāshid, if it is confirmed that a man is a bankrupt, he is to be restricted in the way he deals with his property.<sup>2</sup> In this case, it may be suggested that such restriction is made at the request of the creditors who have claimed their respective debts and until he pays the debts. Such bankruptcy must be certified by the authority. This was held by al-Thawrī.<sup>3</sup> 'Umar b. 'Abd al-'Azīz confiscated the property of a debtor to be given to his creditors.<sup>4</sup> However, he and al-Thawrī permitted any bankrupt person to engage in hiring and business transactions.<sup>5</sup> Ibrāhīm

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1. Supra chapter VI, pp. 353-56.

2. San., VIII, p. 267.

3. Ibid.

4. Mud., V, p. 233; Haz. M., VIII, p. 172.

5. Mud., V, p. 205; San., VIII, p. 267.



al-Nakha'ī added that a person who is under guardianship or interdiction (al-mahjūr 'alayh) should be allowed to engage in any business transaction and hiring as he is subject to any ḥadd (plural ḥudūd) punishments.<sup>1</sup> Al-Thawrī stated further that there can be no interdiction on a Muslim, and a bankrupt is free to engage in business or manufacturing activities, as long as he is not legally declared incompetent in any business transaction by the authorities.<sup>2</sup> According to Ibrāhīm al-Nakha'ī and Zufar, there is no interdiction on a person who has attained puberty, regardless of his not meeting the legal requirements of righteousness and of his squandering and dissipation, as long as he has the faculty of reasoning.<sup>3</sup> Ibrāhīm al-Nakha'ī, Muḥammad b. Sīrīn and Mujāhid added that no interdiction <sup>was imposed</sup> on a free person.<sup>4</sup> This shows that a bankrupt, who has been declared bankrupt by the authority, is allowed to engage in any business transaction or contract of hiring. He is to be restricted in such cases where the creditors claim their debts. However, in another report, Ibrāhīm al-Nakha'ī and Shurayḥ opined that a free bankrupt is not allowed to engage in business transactions, donation, loan or other contracts.

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1. Mud., V, p. 229; San., VIII, p. 267.

2. San., VIII, p. 267.

3. Jam., V, p. 37.

4. Haz. M., VIII, p. 280.

To explain this, Mālik held that the bankrupt is allowed to engage in such a contract and pledge or security if he has paid some of his debts and as long as his creditors do not raise objection and take issue.<sup>1</sup>

According to 'Umar b. 'Abd al-'Azīz an interdicted bankrupt person is not permitted to be detained<sup>2</sup> in prison. But the debtor who is not a bankrupt is to be detained till he pays the debts, and if he fails to do so he will be imprisoned. This was the view of Shurayh, al-Sha'bī and Ṭāwūs.<sup>3</sup>

Other's property with al-muflis (the bankrupt)

Various ways of paying the debts of a bankrupt are possible, if any creditor finds his property with al-muflis. Such solutions are as follows:

a. Ṭāwūs was of the opinion that if a creditor finds his property in the form of capital assets, intact, with al-muflis, he will be more entitled to such property than other creditors.<sup>4</sup> This was also the opinion of al-Ḥasan al-Basrī<sup>5</sup> and al-Zuhrī.<sup>6</sup>

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1. Mud., V, p. 229.

2. Ibid., p. 205.

3. San., VIII, pp. 305-06.

4. San., VIII, p. 265; Haz. M., VIII, p. 176.

5. Haz. M., VIII, p. 176.

6. San., VIII, p. 263.

b. Should a bankrupt purchaser die in cases where the seller has not accepted the price and the seller later finds the goods, he is entitled to such property more than other creditors. This was held by Ibrāhīm al-Nakha'ī, al-Ḥasan al-Basrī<sup>1</sup> and al-Zuhrī.<sup>2</sup> According to Ibrāhīm al-Nakha'ī and al-Thawrī there is no difference between the case of bankruptcy and death.<sup>3</sup>

c. When a man sells his property and accepts a part of the price, he is in the same position as other creditors with respect to it. He is entitled to reclaim or recover the debts, by sharing the payments or property with other creditors. This was held by 'Umar b. 'Abd al-'Azīz,<sup>4</sup> Shurayḥ and Muḥammad b. Sīrīn.<sup>5</sup> It was an extended new ruling made by the Successors.

d. If the bankrupt purchaser has consumed a part of the transacted property, in a small or large portion of it, the vendor is as entitled to such/<sup>a</sup>property as other creditors. This was held by 'Aṭā' b. Abī Rabāḥ.<sup>6</sup> But if the purchaser has consumed a part of such property and he has not yet paid it, the vendor is entitled to whatever

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1. Haz. M., VIII, p. 176.

2. San., VIII, pp. 263-64.

3. Ibid., p. 266.

4. Haz. M., VIII, p. 177.

5. San., VIII, p. 266.

6. San., VIII, p. 265; Haz. M., VIII, p. 176.



is left from such property, not the other creditors.

This was held by Qatāda.<sup>1</sup>

No interdiction (al-ḥajr) on the impoverished (al-mu'sir)

According to al-Ḥasan al-Baṣrī if a debtor appears to be in an impoverished situation, the creditors cannot proceed with their claims for debts from him until his ease or prosperity is established.<sup>2</sup> Further, 'Aṭā' b. Abī Rabāḥ added that anyone who is impoverished is to be granted time until it is easy for him to pay, in the case of usury and debt as a whole. This is because the verse<sup>3</sup> refers to any impoverished debtors among the people.<sup>4</sup> According to al-Nuḥḥās, the view was the best interpretation of the verse.<sup>5</sup> On the other hand, Shurayḥ and Ibrāhīm al-Nakha'ī<sup>6</sup> were of the opinion that the verse<sup>7</sup> refers specifically and only to usury. They shared the same view as 'Abd Allāh b. 'Abbās,<sup>8</sup> that debtors are obliged to pay their debts. Shurayḥ further argued that the Prophet had restricted Mu'ādh b. Jabal to pay his debts, without giving any time to him to pay them.<sup>9</sup>

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1. San., VIII, p. 265.

2. Jam., III, p. 372.

3. Supra chapter VI, p. 356 and Q. 2:280.

4. Jam., III, p. 372.

5. Ibid.

6. Ibid.

7. Supra chapter VI, p. 356 and Q. 2:280.

8. Jam., III, p. 372.

9. Ibid.

2. Al-ḥajr on the incompetent (al-safīh)

Sa'īd b. Jubayr was of the opinion that al-sufahā' (singular al-safīh) are orphans.<sup>1</sup> They should not be given any property which the guardian was instructed to look after.<sup>2</sup> According to al-Nuḥḥās this was the finest interpretation of the verse.<sup>3</sup> In this case, according to al-Qurṭubī<sup>4</sup> the verse, "To orphans restore their property (when they reach their age),"<sup>5</sup> demonstrates the corroboration of the executor (al-waṣī), the guardian (al-walī) and the surety (al-kafīl) for the orphans. Mujāhid, however, considered women were al-sufahā',<sup>6</sup> but al-Nuḥḥās dismissed such a notion. There was no ground for such an idea.<sup>7</sup> According to Ibn Ḥazm, there is no evidence in the Qur'ān or the Tradition which shows that women are al-sufahā'.<sup>8</sup> They are as fully competent as men and may dispose of their property as

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1. T.J., IV, p. 246.
  2. Jam., V, p. 28.
  3. Ibid.
  4. Ibid., pp. 27-28.
  5. Q., 4:2
  6. T.J., IV, p. 247.
  7. Jam., V, p. 28.
  8. Haz. M., VIII, p. 289.

they wish without let or hindrance.<sup>1</sup> Al-Ḥasan al-Baṣrī and Qatāda were of the opinion that the property of al-sufahā' would be given to them by the guardians, whenever they needed it, for the purpose of maintaining them in accordance with the law. Such maintenance will not be given excessively.<sup>2</sup>

3. Al-ḥajr on the minor (al-ṣaghīr)

Minors are to be put under guardianship and before being given themselves the right of guardianship they must be tested for their intelligence, religiosity and ability to manage their property. This was held by al-Sha'bī, Shurayḥ, al-Qāsim b. Muḥammad, Rabī'a b. Abī 'Abd al-Raḥman, 'Aṭā' b. Abī Rabāḥ, al-Ḥasan al-Baṣrī<sup>3</sup> and Mujāhid.<sup>4</sup> They gain the right of guardianship when they appear to have completed fifteen years of age, even though they do not have or show their pubescence (muḥtalim). This was held by 'Umar b. 'Abd al-'Azīz and Zufar.<sup>5</sup> The right of making contract in business transactions was

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1. Subhi Mahmasani, 'Transactions in the Shar'ia', in Law in the Middle East, ed. by Majid Khadduri and Herbert J. Liebesny, I, (Washington, 1955), p. 197.
  2. Jam., V, p. 29.
  3. Haz. M., VIII, p. 285.
  4. Jam., V, p. 34.
  5. Ibid., p. 35.



considered the same. This was held by Qatāda, Ibrāhīm al-Nakha'ī and al-Sha'bī.<sup>1</sup>

In relation *at* obtaining sound judgement (rushda) by a minor, al-Ḥasan al-Baṣrī and Qatāda were of the opinion that this is indicated when a person attains propriety in the faculty of reason or intelligence and religion.<sup>2</sup> But al-Thawrī added that rushda (i.e. prudence) is when a minor attains propriety in the faculty of reason or intelligence and propriety in safeguarding and supervising his property,<sup>3</sup> whereas, Ibrāhīm al-Nakha'ī<sup>4</sup> and Mujāhid<sup>5</sup> considered properness to refer to the faculty of reason and intelligence only. However, Sa'īd b. Jubayr<sup>6</sup> and al-Sha'bī<sup>7</sup> and Mujāhid<sup>8</sup> were of the view that a person can be relied upon to manage his property, when his beard has grown and he has gained his sound judgment or has come of age. An orphan will not be given his property, even though he is elderly until he has maturity of mind and sound judgment. But Ibrāhīm al-Nakha'ī and Zufar were of

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1. San., VIII, pp. 309-10.

2. Abū Bakr Aḥmad b. 'Alī al-Jaṣṣāṣ, op. cit., II, p. 76; Jam., V, p. 37.

3. Jam., V, p. 37.

4. Abū Bakr Aḥmad b. 'Alī al-Jaṣṣāṣ, op. cit., II, p. 76.

5. San., VIII, p. 310; Jam., V, p. 37.

6. Jam., V, p. 37.

7. T.J., IV, p. 253.

8. T.J., IV, p. 253; Haz. M., VIII, p. 288.

the opinion that if a person has reached fifteen years of age, he will be allowed to manage and look after his property, even though he is not of sound judgment.<sup>1</sup>

However, if a major is irreligious, but he is good at or efficient in managing or supervising his property, he is not subject to any interdiction (al-ḥajr). This was the opinion of Shurayḥ.<sup>2</sup>

The guardian can use the property of an orphan

The use of the property of an orphan by the guardian who carries out his guardianship, is allowed for the latter's daily subsistence. Such use should be just and reasonable. Sa'īd b. Jubayr,<sup>3</sup> Mujāhid<sup>4</sup> and al-Sha'bi<sup>5</sup> considered such use as a loan for the guardian should he be in need, but he is, nevertheless, obliged to pay it back whenever he is well off. In addition, he is not allowed to use it as a loan to a greater extent than he needs. According to Ibrāhīm al-Nakha'ī, 'Atā' b. Abī Rabāḥ, al-Ḥasan al-Baṣrī and Qatāda, no repayment is obligatory on the poor executor

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1. Jam., V, p. 38.

2. Ibid.

3. J. Ma., II, p. 71; T.J., IV, p. 256.

4. T.J., IV, p. 256; Abū Bakr Aḥmad b. 'Alī al-Jaṣṣāṣ, op. cit., II, p. 77.

5. Jam., V, pp. 41-42.

for what he has justly and reasonably used (al-akl bi al-ma'rūf), because that is his right on account of duties as guardian.<sup>1</sup> According to al-Sha'bī, such just and reasonable use is like usufructing the milk of cattle, having services from servants and riding animals or vehicles, as long as such usufruction does not impair or damage the property itself. Hence, the capital assets or objects of material value are not allowed to be usufructed by the executor (al-waṣī) who becomes the guardian.<sup>2</sup> He was of the opinion that such use is allowed in the case of absolute necessity (ḍarūra) only.<sup>3</sup> Ibrāhīm al-Nakha'ī concluded the discussion on this subject by giving his ruling that the verse "Let him (the guardian or executor) have for himself what is just and reasonable"<sup>4</sup> means that he should use his own property in such a way that he does not need to use the orphan's property. Therefore, the well-off guardian should refrain from claiming any remuneration because of his wealthiness and the poor should restrict his spending on himself so that he does not need to live off the property of orphans.<sup>5</sup> Al-Nuḥḥās regarded the

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1. T.J., IV, pp. 259-60; Jam., V, p. 42.

2. Jam., V, p. 42.

3. T.J., IV, p. 256; Abū Bakr Aḥmad b. 'Alī al-Jaṣṣās, op. cit., II, p. 77.

4. Q., 4:6.

5. Cf. J. Ma., II, p. 72; Jam., V, p. 43.



latter's opinion as the best interpretation of the verse, because use of other people's property, without their prior consent, is prohibited. This case is without exception unless other cogent or conducive evidence exists.<sup>1</sup> According to al-Ṭabarī, wariness in using such property is more preferable.<sup>2</sup> Muḥammad b. Sīrīn opined that if the executor, or the guardian, is suspected to use the property unjustly, or to commit other infringements of law, the guardianship is withdrawn and, to be transferred to others. However, al-Sha'bī held that the guardianship can also be jointly authorized with other persons.<sup>3</sup>

No comment was made by the Successors on maintenance of a minor being provided for by the guardian out of the property until the former reaches the age of maturity and has a sound mind.

### Conclusion

The above contracts, i.e. al-qard (loan of fungible objects for consumption), al-ʿāriyya (loan of non-fungible objects or gratuitous loan) and al-wadīʿa (deposit) have their legal similarities and they were juxtaposed in their juridical developments which evolved

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1. Jam., V, p. 43.
  2. T.J., IV, pp. 260-61.
  3. San., VIII, p. 184.

in the times of the Prophet, the Companions and the Successors. As an extension to such legal process in these subjects, al-ḥajr (interdiction) developed its own identity to safeguard the right of disposal of property by the bankrupt, the incompetent and the minor. Al-ḥajr has some relationship with al-qard, to a certain extent, especially with the bankruptcy and the bankrupt.

Al-qard and al-ʿāriyya are considered as good and charitable deeds. However, al-wadīʿa is a fiduciary relationship or trusteeship (amāna), which may amount to a recommendable deed as well. In al-qard, the interest of the parties in the contract is safeguarded and they are prohibited from involving in any usurious element which may exist in it. In both al-qard and al-ʿāriyya the integrity of both parties, especially the lenders, is legally protected. However, in the case of al-wadīʿa, the integrity of the depositor and depositary is also legally secured from any act of injustice by the respective party. Such regulations were the judicial process of this aspect of the legal system which developed in early Islam.

In relation to al-ḥajr, Islamic law initiated it to extend its compass to the three different persons who are legally bound to be interdicted. This law of interdiction had not existed and had not been practised in pre-Islamic times. Those who are liable to interdiction are the bankrupt (al-muflis), the legally

incompetent (al-safīh) and the minor (al-ṣaghīr). Beside that, the law protects the guardian, the interdicted persons and others, especially the creditors, and their property. Primarily, the most striking point which should be indicated here is that the competent bankrupt is still juridically permitted to engage in business transactions, donation, loan and other contracts, as long as his creditors do not raise any objection.



CHAPTER VII

AL-KAFĀLA (SURETYSHIP) AND  
AL-RAHN (PLEDGE OR SECURITY)

In this chapter, an inquiry will be made into the legal developments, at their rudimentary stage, in respect of the two closely interrelated subjects of Islamic law, viz. al-kafāla (suretyship) and al-rahn (pledge or security). The discussion will be focused on:

I. Al-kafāla (Suretyship)

1. Its definition, origin, legality and pre-Islamic practice.
2. The conditions for al-kafāla (suretyship).
  - i. Surety with a known degree or scope;
  - ii. No preconditions in al-kafāla (suretyship); and
  - iii. Conditional suretyship.
3. The types of al-kafāla (suretyship).
  - i. Al-kafāla bi al-nafs (Suretyship for the person); and
  - ii. Al-kafāla bi al-māl (Suretyship for the claim).

The above examination will concentrate on judicial injunctions of the Qur'ān and the Prophet, the rulings of the Companions and the Successors.

II. Al-rahn (Security or pledge)

1. Its definition, origin, pre-Islamic practice and its legality.
2. The conditions for al-rahn (security).
  - i. Security in journey, in a period of domicile and its return;
  - ii. Utilization or usufruction from the security;
  - iii. Pledge with possession;
  - iv. The durability of al-rahn (security);
  - v. The provision and supply of security and its beneficial uses;
  - vi. The security is a trusteeship;
  - vii. Forfeiture of security;
  - viii. The damage of security; and
  - ix. The dissolution or nullity of al-rahn (security).

The above investigations will also concentrate on the judicial injunctions of the Qur'ān, the Prophet and the extensive rulings of the Companions and the Successors.

I. Al-kafāla (Suretyship)

The definition of al-kafāla

Literally, al-kafāla means responsibility, amenability or suretyship<sup>1</sup> and legally it is the pledge given by the guarantor or the surety (al-kafīl) to a creditor (al-makfūl lah, al-dā'in), on behalf of the principal debtor (al-aṣīl, al-makfūl 'anh), to secure that the guaranteed (al-makfūl bih), i.e. the debtor, will be present at a definite place, e.g. to pay his debt, or fine or, in the case of retaliation lex talionis, to undergo punishment.<sup>2</sup> However, suretyship in Islamic law is the creation of an additional liability with regard to the claim, not to the debt, the assumption not of the debt but only of a liability, and it has its origin in procedure.<sup>3</sup>

The origin, legality of al-kafāla and its pre-Islamic practice

The word al-kafāla originated in the Qur'ān:

"He (Zakariyyā) took care (as a surety)  
of her (Mary)."<sup>4</sup>

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1. Lan., II, p. 3001.

2. Th. W. Juynboll, EI<sup>1</sup>, vol. II, p. 618;  
cf. Sab., III, pp. 333-34.

3. Intro., p. 158.

4. "وَكَفَّلَهَا زَكَرِيَّا", Q., 3:37. Cf. IH., II, p. 163;  
Sab., III, p. 333.



However, the legality of al-kafāla was recognized by the Qur'ān and the Prophet:

i. The verse of the Qur'ān which says:

"Jacob said: Never will I send him with you until ye swear a solemn oath to me, in God's name, that ye will be sure to bring him back to me."<sup>1</sup>

According to al-Qurṭubī, this verse was the basis for the legality of al-kafāla (or it was also known as al-ḥamāla) involving the corpus of a property or capital asset (al-'ayn) and the security or suretyship (al-wathīqa) for a person (bi al-nafs).<sup>2</sup>

"For him who produces it, is (the reward of) a camel-load; I will be bound by it."<sup>3</sup>

In this verse, according to al-Ṭabarī, za'im implies kafīl.<sup>4</sup>

The above two verses show the earliest practice of al-kafāla known in pre-Islamic times.

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1. Q., 12:66.

2. Jam., IX, p. 225.

3. "ولمن جاء به حمل بعير وأنا بيزعيم" Q., 12:72. See Jam., IX, pp. 231-34.

4. T.J., XII, p. 20.

ii. In the Traditions, the Prophet is reported to have said, concerning al-kafāla:

"The surety (al-za'īm) is a guarantor (ghārim)."<sup>1</sup>

To support the justification or legality of al-kafāla, al-Shāfi'ī reported a Tradition which recounted how, when Qubayṣa b. al-Mukhāriq had a suretyship, the Prophet told him:

"O Qubayṣa! requesting (things) is forbidden except in three things [first] when a man has a suretyship then request for it is permissible."<sup>2</sup>

According to al-Muzanī,<sup>3</sup> in the above first Tradition, al-za'īm implies al-kafīl (the surety)<sup>4</sup> and according to al-Kāsānī<sup>5</sup> ghārim has the connotation of dāmin (a guarantor) in this instance.<sup>6</sup> Qabīl may also denote kafīl or dāmin,<sup>7</sup> as in the verse:

1. J. Ma., II, pp. 58 and 73; Amali, p. 33; San., VIII, p. 173.

2. "يا قبيصة المسألة حرمت الا في ثلاث رجل تحمل حمالة فحلت له المسألة."  
See Um., III, p. 234; cf. M. in Um., VIII, p. 206.

3. M. in Um., VIII, p. 206.

4. Lan., I, p. 1233.

5. Kas., VI, p. 2.

6. Cf. Niha., III, p. 363; Lis., XII, p. 266.

7. Lis., XIII, p. 257; cf. Taj., III, p. 71.

"Or thou bring God and the angels  
before (us) face to face (qabīlā)."<sup>1</sup>

According to al-Qurṭubī, 'Abd Allāh b. 'Abbās and al-Daḥḥāk were of the opinion that al-qabīl means al-kafīl.<sup>2</sup> Further, according to al-Kāsānī, al-ḥamīl means the one or person who is responsible for suretyship and may also connote al-kafīl.<sup>3</sup>

For the legality of al-kafāla, in the case of debt, it was also reported that the Prophet was willing to be held responsible for the debts of a dead person.<sup>4</sup> This was supported by the above Tradition of Qubayṣa, because in that Tradition hamāla means kafāla (suretyship). However, al-kafāla relates to all business transactions. Al-Shāfi'ī also used al-ḥamīl in the same connotation of al-kafīl.<sup>5</sup> In summary, al-kafāla was also known as al-damān,<sup>6</sup> al-za'āma, al-qabāla and al-ḥamāla.<sup>7</sup>

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1. Q., 17:92.

2. Jam., X, p. 331.

3. Kas., VI, pp. 2-3; cf. Lis., XI, p. 180.

4. San., VIII, p. 291.

5. Um., III, p. 234; T.J., XII, p. 21; cf. Niha., I, 442; A'lam, IV, p. 37.

6. Jaz., III, p. 221.

7. Haz. M., VIII, p. 110.



The conditions for al-kafāla

i. It is not permissible to give surety to an unknown degree or scope.<sup>1</sup> This corresponds to the verse of the Qur'ān which says:

"Eat not up your property among yourselves in vanities, but let there be amongst you trade by mutual good will."<sup>2</sup>

According to Ibn Ḥazm, any surety should be made within a known degree and with the mutual agreement of the two parties.<sup>3</sup>

ii. It is not permissible to specify any precondition in cases of al-kafāla. For example, a condition whereby two sureties in a transaction would be specified, a choice being made between these two sureties at any time. The Prophet is reported to have invalidated any condition which is not in the Book of God,<sup>4</sup> i.e. the Qur'ān.

iii. Conditional suretyship is permissible in accordance with the verse of the Qur'ān which says:

"For him who produces it, is (the reward of) a camel-load; I will be bound by it."<sup>5</sup>

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1. Haz. M., VIII, p. 117.

2. Q., 4:29.

3. Haz. M., VIII, p. 117.

4. Ibid., pp. 118-19.

5. Q., 12:72.

This type of al-kafāla refers to a situation in which a man says: "If you lend (one dīnar or some property) to so and so I will be the surety for you."<sup>1</sup>

According to Abū Ḥanīfa, Abū Yūsuf and Mālik, this type of al-kafāla is permitted, because the Prophet is reported to have appointed and authorized Zayd b. Ḥāritha as the commander of the army in the raid on Mu'ta in 8 A.H.; if Zayd were to be slain then Ja'far b. Abī Ṭālib was to take command, and if he were killed then 'Abd Allāh b. Rawāḥa would succeed him.<sup>2</sup> If such a venture (al-mukhāṭara) is allowed in military, governmental or administrative affairs, then it is likewise permissible in suretyship.<sup>3</sup>

#### The types of al-kafāla

Al-kafāla has two types:

##### 1. Al-kafāla bi al-nafs (suretyship for the person)

This kind of al-kafāla is also known as ḍamān al-wajh.<sup>4</sup> Standing surety for a person means assuming liability for the appearance of the debtor or of his agent in a lawsuit; it is effective only if a lawsuit is

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1. Haz. M., VIII, p. 117; Sab., III, p. 336.

2. IḤ., IV, p. 7.

3. Haz. M., VIII, p. 117.

4. Cf. Jaz., III, p. 224; Sab., III, p. 337.

possible, and not if the debtor has absented himself and his whereabouts are unknown; it is annulled by the death of the guarantor or of the debtor; in the case of non-performance, the guarantor is imprisoned.<sup>1</sup> A precedent was set for this by the Prophet when he said:

"The surety is a guarantor."<sup>2</sup>

ii. Al-kafāla bi al-māl (Suretyship for the claim)

Suretyship for the claim can be independent or additional to suretyship for the person; if the guarantor stipulates that the debt of the principal debtor be remitted, its effect is that of al-ḥawāla (Transference of debts from one person to another; assignment of debts).<sup>3</sup>

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1. Intro., pp. 158-59.

2. J. Ma., II, p. 73; San., VIII, p. 173. According to Schacht, al-kafāla may involve both debts involving sums of money and also unsecured claims relating to non-fungible objects. He goes on to state that the liability of the guarantor does not, generally speaking, exceed that of the debtor; consequently, acquittal of the debtor by the creditor leads automatically to acquittal of the guarantor, but not vice versa. The guarantor may have recourse, against the principal debtor, however, when the latter has asked him to stand surety. See Intro., pp. 158-59.

3. Intro., p. 158; cf. infra chapter IX, pp. 485-91.



Concerning this type of al-kafāla, the Prophet is reported to have established a precedent for al-kafāla bi al-dayn (suretyship for the debt) only. The Prophet did not offer his prayer for a dead man who was liable to pay debts. Once, a dead man was brought in and the Prophet asked, "Had he had debt?" The people replied: "Yes, two dīnārs." The Prophet said: "Therefore, say the funeral prayer for your friend." One Abū Qatāda said: "O! Messenger of God, the two dīnārs are my responsibility." Accordingly, he prayed for the dead man. Afterwards, the Prophet said:

"I am closer to every believer than his own self, so if a true believer dies and leaves behind some debts to be paid, I am responsible (the surety) (for the debt), and if he leaves behind some property, it will be for his inheritors."<sup>1</sup>

In another report, 'Alī b. Abī Ṭālib also used to be the guarantor of a deceased person for his debts, in front of the Prophet. In consequence of that the latter prayed for the deceased.<sup>2</sup>

The above Traditions indicate the validity of suretyship on behalf of a dead person and that it has recourse to the surety and not to the property of the

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1. San., VIII, p. 290; cf. Kas., VI, pp. 2-3.

2. M. in Um., VIII, p. 206.

dead person. According to al-Muzanī, the debt of a dead person must be guaranteed by a surety.<sup>1</sup> The above Traditions also attested that the presence<sup>2</sup> and acceptance by the claimant, i.e. the creditor, are not necessary in either case of suretyship.<sup>3</sup>

### The Companions and the Successors

No comment was made by the Companions regarding al-kafāla. But some extended rulings were made by the Successors on al-kafāla, as a continuation of the injunctions which had been made by the Prophet. Their rulings on the subject were:

- i. According to 'Aṭā' b. Abī Rabāḥ,<sup>4</sup> Shurayḥ, Qatāda and 'Amr b. Dīnār,<sup>5</sup> it is permissible to make a contract of suretyship in a sale being given by the guarantor (al-kafīl) in a written letter on behalf of the principal debtor (al-aṣīl), to a creditor (al-makfūl lah), to secure the guaranteed (al-makfūl bih). Such a suretyship was valid for as long as a lifetime or for as long as the guarantor remained in affluent circumstances.
- ii. Shurayḥ allowed a man to seek a surety, in a written letter, from anyone who is able to take on this role

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1. M. in Um., VIII, p. 206; Haz. M., VIII, p. 112.  
 2. Haz. M., VIII, p. 112.  
 3. Kas., VI, p. 2.  
 4. Mud., V, p. 262; San., VIII, pp. 171-72.  
 5. San., VIII, pp. 171-72.

voluntarily, especially wealthy people.<sup>1</sup> Muḥammad b. Sīrīn suggested that a condition should be stipulated for suretyship on debt either in total or sundry and manifold.<sup>2</sup> But al-Thawrī allowed suretyship to be made in any way in which al-kafīl likes.<sup>3</sup>

iii. There is no liability on a partner if he becomes the surety of his partner for their debt, because it is not appropriate for one of them to pay the debt, without the other. This was held by al-Thawrī.<sup>4</sup>

iv. In the case of suretyship for a person (al-kafāla bi al-nafs), Shurayḥ ruled that any guarantor (al-kafīl), who had failed to perform his obligation could be detained.<sup>5</sup>

v. In the case of a suretyship for a claim (al-kafāla bi al-māl), when a person asks the second person to pay his debt to the third person, and later the second person acknowledges his payment to the third person. Such acknowledgement will be accepted if it is coupled

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1. San., VIII, p. 172.

2. Ibid.

3. Ibid.

4. Ibid., p. 173.

5. Ibid.



with an oath in the event of no evidence. This was held by Shurayḥ.<sup>1</sup> However, Shurayḥ ruled that any acknowledgment of payment of a debt, in al-kafāla, should be supported by evidence.<sup>2</sup> There is no liability on al-kafīl who pledges to become a surety until a time limit of payment is set. This was the opinion of Ibn Abī Laylā.<sup>3</sup>

vi. According to Shurayḥ, if al-kafīl has paid the debt at the fixed price which has been agreed between him and the principal debtor (al-aṣīl) then the latter is entitled to the goods. In the case of many principal debtors, the shares of debt are to be allotted or divided among them accordingly, and they are responsible for such debts respectively.<sup>4</sup>

vii. Al-Ḥasan al-Baṣrī and Muḥammad b. Sīrīn considered al-kafāla to be the same status, with regard to legal conditions, as al-ḥawāla (Transference of debts from one person to another; assignment of debts).<sup>5</sup>

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1. San., VIII, p. 173.
  2. Ibid., p. 174.
  3. Ibid.
  4. Ibid., pp. 174-75.
  5. Haz. M., VIII, p. 113.

viii. Shurayh, Muḥammad b. Sīrīn, 'Aṭā' b. Abī Rabāḥ and 'Amr b. Dīnār allowed any condition in a suretyship between two goods and al-aṣīl (the principal debtor) may take whichever of them he wishes. They also allowed any condition made by al-kafīl (the guarantor) for himself or for al-aṣīl and any condition that a rich person among them should take the goods from the insolvent, and whoever of them is present to take these goods from the absent.<sup>1</sup>

## II. Al-rahn (Security or pledge; Pawn).<sup>2</sup>

### The definition of al-rahn

Al-rahn literally means readiness or immutability and durability.<sup>3</sup> It also implies that a thing is inseparable from or tied up with its acquisition, earnings and deeds;<sup>4</sup> it is mentioned in the Qur'ān:

"Every soul will be (held) in pledge  
for its deed."<sup>5</sup>

According to Islamic law, al-rahn has been modified, and has definitely acquired a different connotation from

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1. Haz. M., VIII, p. 118.

2. Schacht, EI<sup>1</sup>, vol. III, p. 1105.

3. Taj., XI, p. 221; cf. Lan., I, pp. 1172-73.

4. T.J., XXIX, p. 165; Jam., XIX, p. 85.

5. Q., 74:38.

its original ancient, or pre-Islamic, meaning.<sup>1</sup> Legally, al-rahn means to pledge or lodge a real or corporeal property of material value, in accordance with the law, as security for a debt or pecuniary obligation,<sup>2</sup> so as to make it possible for the creditor to regain the debt or some portion of the goods or property.<sup>3</sup> Al-rahn constitutes a security where a contract of sale cannot be legally given except by mutual consent of the interested parties, i.e. by offer and acceptance<sup>4</sup> pledge becomes binding (lāzim) when possession of it is taken.<sup>5</sup> This contract may correspond to the Roman Pignus.<sup>6</sup>

#### The origin of al-rahn and pre-Islamic practice

The usage of pre-Islamic al-rahn (pledge or security), among the Arabs, implies a type of earnest money which was lodged as a guarantee and material evidence or proof of a contract, especially when there was no scribe available to put it into writing.<sup>7</sup> The institution of

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1. Intro., p. 8.

2. Cf. Lan., I, p. 1172.

3. Cf. Lis., XIII, p. 188; cf. Taj., XI, pp. 221-22; Tahanawī, III, p. 83; Jam., III, p. 409; Sab., III, p. 152.

4. Kas., VI, p. 135.

5. Intro., p. 139.

6. Ibid., p. 21.

7. Orig., p. 186; supra chapter III, pp. 156-58.



earnest money was not accepted legally in Islamic law and the common Islamic doctrine recognized al-rahn only as a security for the payment of a debt.<sup>1</sup>

The legality of al-rahn

Evidence for the legality of al-rahn is as follows:

i. In the Qur'ān:

"If ye are on a journey, and cannot find a scribe, a pledge with possession (may serve the purpose) and if one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him fear his Lord."<sup>2</sup>

ii. In two Traditions:

a. The Prophet was reported to have bought some food-stuff on credit for a limited period and to have given his armour as a security for it.<sup>3</sup>

b. The Prophet is reported to have said:

"He who has a pledge let him return it to him who entrusted him with it."<sup>4</sup>

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1. Orig., p. 186. See supra chapter III, pp. 156-58.

2. Q., 2:283.

3. Cf. Han. M., p. 164 (348); J. Ma., II, p. 38; cf. Um., III, pp. 141-42; Ah., M., III, p. 355 (2109).

4. Ih., IV, p. 185.

The conditions for al-rahn

i. Security in a journey, a period of domicile and its return

From the above evidence, such a security may be given during a journey, as in the above verse, during a stay or a period of domicile (muqīm), as in the above Tradition where the Prophet made the security while staying in Medina.<sup>1</sup> The second Tradition shows that the return of a pledge is obligatory.

ii. Utilization or usufruct of pledgee from the security

The contract of al-rahn is a contract meant for pledging the security of a debt, and it is not meant for investment and profitable use. Therefore if the security is contracted for such purposes the exploitation of such profitable use is considered as usury. However, such usufruct can be utilized by the pledgee (al-murtahin) where the pledged property (al-marhūn) which is given as security is riding or milking animals. In this case, the pledgee may usufruct such animals, provided he pays the cost of maintaining them,<sup>2</sup> as a right of security (ḥaqq al-wathīqa).<sup>3</sup> To support such legal rulings, the Prophet is reported to have said:

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1. Um., III, pp. 141-42.

2. Cf. Niha., I, p. 422; Sab., III, pp. 156-57.

3. A'lam, I, p. 478.

"The milch animal may be milked and  
the riding animal may be ridden  
according to what one spends on  
their upkeep (in the case of pledge  
or security)."<sup>1</sup>

iii. Pledge with possession

The most important condition in relation to the contract of pledge is that the pledged property must be possessed by the pledger (al-rāhin) or debtor. Any other's property, which is not possessed by the pledger, may not be secured by him.<sup>2</sup> In this matter, it is stated in the Qur'ān:

"A pledge with possession (may serve  
the purpose (farihān maqbūda))."<sup>3</sup>

iv. The durability of al-rahn until the debt paid

In the verse "A pledge with possession (may serve the purpose)"<sup>4</sup> indicates that the pledger is the real owner of the pledged property. Therefore, it is not permissible for the pledgee to dissolve the contract until the debt is paid by the pledger.<sup>5</sup> This particular verse also demonstrates that any shareholder in a joint ownership (al-mushā') may put his share, divided or

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1. San., VIII, p. 244.
  2. Um., III, p. 142.
  3. Q., 2:283.
  4. Ibid.
  5. Um., III, pp. 142-43.



otherwise, as security to his partner or others. The permissibility of such a pledge or security is based on the observation that this verse can be taken to apply generally to any owned property.<sup>1</sup>

v. The provision and supply or encumbrance (ma'ūna) of security and its beneficial uses

The provision and supply or encumbrance of security which is not guaranteed, i.e. including the cost of its maintenance, its return and its substitution, is payable by its owner and its beneficial use is also returned to him who, in this case, is the pledger.<sup>2</sup> The Prophet is reported to have said:

"The pledge is from the owner who has secured it. Whatever damage, the replacement will be incurred on him (the pledger), not on others."<sup>3</sup>

The Prophet emphasized his support for this further by saying:

"To the pledger (al-rāhin) return his profit (ghunmuh) and he is held responsible for his loss (ghurmuh)."<sup>4</sup>

The security's augmentation, growth or accession (namā')

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1. Haz. M., VIII, p. 88.

2. Um., III, p. 170.

3. Ibid.

4. Um., III, p. 170; San., VIII, pp. 237-38.

will be included in the security but it will not become a part of it. Offspring, wool, fruit and the like will not become a part of a security nor be included in it.<sup>1</sup> On this subject Mālik opined that if a man pledges his garden for a stated period and the fruits of that garden are ready before the end of that period, the fruits are not included in the pledge with the real estate, unless it is stipulated by the pledger in his pledge.<sup>2</sup> For this case, the Prophet is reported to have said:

"If someone sells a palm which has been pollinated, the fruit belongs to the seller unless the buyer stipulates its inclusion."<sup>3</sup>

vi. The security is a trusteeship

The security is considered a trust in the hands of a pledgee (al-murtahin).<sup>4</sup> This corresponds to the order in the Qur'ān:

"If one of you deposits a thing on trust with another, let the trustee (faithfully) discharge his trust, and let him fear his Lord."<sup>5</sup>

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1. Um., III, pp. 167-68; Sab., III, p. 158.

2. Muw. Y., p. 625.

3. Muw. Sh., p. 280; Muw. Y., p. 625; Han. M., p. 161 (338).

4. Um., III, p. 170.

5. Q., 2:283.

This also relates to the Tradition of the Prophet:

"He who has a pledge (amāna or  
trusteeship) let him return it  
to him who entrusted him with it."<sup>1</sup>

vii. Forfeiture of al-rahn

According to Ibn al-Athīr<sup>2</sup> and al-Qurṭubī,<sup>3</sup> the practice of the Arabs in pre-Islamic times, the pledgee (al-murtahin) had the power to forfeit any pledge, should the pledger (al-rāhin) be unable to pay the debt. The pledge, therefore, became the property of the pledgee. Such practice was abolished and prohibited by Islam. The Prophet is reported to have stressed this saying:

"The security is not forfeited."<sup>4</sup>

Al-Shaybānī added to this Tradition that the Prophet had said:

"The security is not forfeited and  
it does not belong to the pledgee  
(al-murtahin), as his property."<sup>5</sup>

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1. IH., IV, p. 185.

2. Niha., III, p. 379.

3. Jam., III, p. 413.

4. Muw. Y., p. 624; San., VIII, pp. 231-38. Schacht claims that this Tradition arose from the results of the early systematic reasoning and was formulated in the first half of the second century of the Hijra, but he gives no evidence for this assertion. See Intro., p. 39.

5. Muw. Sh., p. 302.



This Tradition also implies the abiding or continuation of the security or pledge until the debt is paid. In the case of no forfeiture of al-rahn, according to Mālik:

"The explanation of the Tradition is that a man gives a pledge to somebody in security for something. The pledge is superior to that for which he pawned it. The pledger says to the pledgee, 'I will bring you your due, after such and such a time. If not, the pledge is yours for what it was pledged for.' This transaction is forbidden. If the owner brings what he pledged it for after the period, it is his. I think that the time condition is void."<sup>1</sup>

viii. The damage of security

If any property, which becomes security is damaged by itself, the pledger loses his right of security and no liability will be incurred on the pledgee.<sup>2</sup> The Prophet is reported to have said:

"To the pledger (al-rāhin) returns his profit (ghunmuh) and he is held responsible for his loss (ghurmuh)."<sup>3</sup>

The Prophet is also reported to have said:

"... Whatever damage, the replacement will be incurred on him (the pledger), not on others."<sup>4</sup>

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1. Muw. Y., pp. 624-25.

2. Haz. M., VIII, p. 99.

3. Um., III, p. 170; San., VIII, pp. 237-38.

4. Um., III, p. 170.

The loss in the first Tradition implies damages. According to Ibn Ḥazm, this was supported by a verse in the Qur'ān:

"Some of the desert Arabs look upon their payments as a fine (maghrama)."<sup>1</sup>

Maghrama here is irretrievably lost, without any profit or benefit.<sup>2</sup>

ix. The dissolution or nullity of al-rahn

If either of the parties in the contract of al-rahn dies, the contract will be dissolved automatically. This was justified by Ibn Ḥazm<sup>3</sup> with the Qur'ānic verse:

"Every soul draws the meed of its acts on none but itself."<sup>4</sup>

The Companions

There was no indication of any contradictory practice of al-rahn by the Companions, or their prohibition of such practice. This implied that the Companions followed the practice of the Prophet in rahn contracts. To support their approval of al-rahn and its practice, there were some rulings which were made by them on certain subjects of al-rahn. These rulings were as follows:

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1. Q., 9:98.
  2. Hazm, M., VIII, p. 99.
  3. Ibid., p. 100
  4. Q., 6:164.

Utilization or usufruction of the pledgee from the security

Abū Hurayra allowed the usufructing of pledged property (al-marhūn) by the pledgee (al-murtahin), for example by riding or milking it, if such property was in the form of riding or milking animals,<sup>1</sup> provided that such an animal was stall-fed or fattened (ma'lūf).<sup>2</sup> However, 'Abd Allāh b. Mas'ūd considered such usufruction as usury.<sup>3</sup> Possibly, it amounted to usury, if the pledgee usufructed the animal without paying for its upkeep.

If the pledged property (al-marhūn) was a piece of land, the fruits from the land were to be given to the pledger (al-rāhin). This was held by Mu'ādh b. Jabal.<sup>4</sup>

The damage of security

If any property, which became security was damaged, the pledgee was not liable to pay any liability. The parties should withdraw the contract with each other and settle, between themselves, the remainder. This view was held by 'Alī b. Abī Ṭālib.<sup>5</sup> According to him, the pledgee was liable if the pledged property was damaged because of his perpetration of a crime in respect of it.

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1. Um., III, pp. 158 and 167.

2. San., VIII, p. 244; Haz. M., VIII, p. 90.

3. San., VIII, p. 245.

4. San., VIII, p. 245; Haz. M., VIII, p. 99.

5. Um., III, p. 192; Haz. M., VIII, p. 97; Tah. Adh., p. 35.



But he was cleared if the damage was caused by any calamity or disaster.<sup>1</sup>

No rulings on al-rahn were made by the Companions, other than the above views commenting on this subject. This implies that they followed the instructions of the Prophet in respect of this subject.

### The Successors

The legality of al-rahn was recognized by the Successors. In this subject, they developed its theory and practice, by extending their rulings so that its workability might proceed further. Their rulings on al-rahn, were as follows:

#### Utilization or usufruct of pledgee from the security

Ibrāhīm al-Nakha'ī, al-Sha'bī<sup>2</sup> and Muḥammad b. Sīrīn<sup>3</sup> disallowed the pledgee to usufruct anything from the security. But Ibrāhīm al-Nakha'ī permitted the consumption of the milk from pledged animals, if it does not exceed the cost of feeding the animal. If it does exceed such an amount, however, then such consumption is considered usury.<sup>4</sup> Shurayḥ, however, disallowed consuming such milk in whatever circumstances and

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1. Haz. M., VIII, p. 97.

2. San., VIII, p. 244.

3. Haz. M., VIII, p. 93.

4. Ibid., pp. 90-91.

considered such consumption as usury.<sup>1</sup> The latter's opinion was a different ruling from the injunction which had been laid down by the Prophet. It may be suggested that the Successors were very anxious to avoid any exploitation by the pledgee on the pledged property, even though the Prophet had permitted such utilization. However, according to Qatāda the pledgee is allowed to read the Qur'ān, if the pledged property is a copy of the Qur'ān. But such security with the Qur'ān is disapproved of.<sup>2</sup>

Pledge with possession and the durability of al-rahn until the debt is paid

Qatāda, 'Aṭā' b. Abī Rabāḥ<sup>3</sup> and 'Amr b. Dīnār<sup>4</sup> agreed that a pledge with possession (may serve the purpose). Qatāda and 'Aṭā' b. Abī Rabāḥ<sup>5</sup> were of the opinion that such a pledge should be kept by the pledgee.<sup>6</sup> Furthermore, according to Ibrāhīm al-Nakha'ī, al-Sha'bī<sup>7</sup> and 'Aṭā' b. Abī Rabāḥ, a pledge may also be left with a trustworthy person.<sup>8</sup> This indicates, however, that it is

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1. San., VIII, pp. 244-45.

2. Ibid., p. 246.

3. Um., III, p. 143; Jam., III, p. 410.

4. Um., III, p. 143.

5. Ibid.

6. Jam., III, p. 410.

7. San., VIII, p. 241.

8. Haz. M., VIII, p. 88.

not permissible for the pledgee to dissolve the contract until the debt is paid by the pledger.

The provision and supply or encumbrance (ma'ūna) of security and its beneficial uses

Shurayḥ and Tāwus were of the opinion that the supply and provision of security, its substitution and return is payable by its owner and its beneficial use is returned to him, who is also the pledger. Al-Zuhrī also agreed with this opinion.<sup>1</sup> In addition, Al-Sha'bī, Muḥammad b. Sīrīn<sup>2</sup> and Sa'īd b. al-Musayyib<sup>3</sup> held the opinion that it is to the pledger (al-rāhin) that his profit (ghunmuh) returns and he is held responsible for his loss (ghurmuh).

The security is a trusteeship

No comment was made by the Successors on this matter, except 'Aṭā' b. Abī Rabāḥ who regarded the security as a wathīqa (a policy or a trusteeship), if it is damaged, the pledgee is not liable to give all the whole loaned property as a charge,<sup>4</sup> or as a claim for damages. This indicated that they followed the Prophet's injunction and they did not give any further rulings on it.

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1. San., VIII, pp. 237-38.

2. Jam., III, p. 412.

3. Ibid., p. 413.

4. Haz. M., VIII, p. 97.



Forfeiture of al-rahn

Shurayh and Tāwūs,<sup>1</sup> al-Sha'bī and Muḥammad b. Sīrīn<sup>2</sup> held the view that the security is not forfeited.

The damage of security

1. Shurayh,<sup>3</sup> al-Sha'bī and al-Ḥasan al-Baṣrī stated that if any property, which becomes security has been damaged by itself, no liability will be incurred on the pledgee.<sup>4</sup> In other words, the security takes the place of that for which it is given. In supporting the above view, 'Atā' b. Abī Rabāḥ regarded the security as a policy or trust (wathīqa). Consequently, if the security is damaged, as the result of any transgression by the pledgee, the pledger is not liable to pay the debt to the pledgee anymore.<sup>5</sup> But according to Ibrāhīm al-Nakha'ī<sup>6</sup> and Qatāda,<sup>7</sup> if the security exceeds the amount of debt, the pledger has no right of any liability from the pledgee. If the debt exceeds the amount of security, the pledgee has to retribute or repay to the pledger the excess or surplus. According to al-Ḥasan al-Baṣrī, neither party has any liability in the case of any damage and the right to claim the debts is dropped, regardless

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1. San., VIII, p. 238.

2. Jam., III, p. 412.

3. Tah. Adh., p. 35.

4. San., VIII, pp. 238-39.

5. Haz. M., VIII, p. 97.

6. Cf. J. Ma., II, p. 39; Ath., p. 196 (884).

7. Cf. J. Ma., II, p. 39; San., VIII, p. 239.

of the amount or value of security.<sup>1</sup> It appears that al-Ḥasan al-Baṣrī, in this case, was eager to avoid any disagreement between the parties involved.

ii. Al-Ḥasan al-Baṣrī, Qatāda, Ṭāwūs and al-Sha'bī were of the opinion that if the security is an animal, the pledgee has no liability when it dies. In this case, they held that the pledger should replace a new pledge.<sup>2</sup>

iii. Al-Sha'bī and al-Ḥasan al-Baṣrī were of the opinion that if the pledger put the security in the hands of a trusted pledgee and then the security becomes damaged, the pledger has liability to pay the debt. In this case, the pledgee has more right to the security than other debtors.<sup>3</sup> Qatāda considered, in this particular case, that the security has not been possessed by the pledger if it has been given to other people and it has been damaged in their hands. In such a case, the pledgee has the same right to the security as other debtors. But if the security has been possessed by the pledger, the pledgee has more right of a new security than other debtors, in case of it having been damaged by itself.<sup>4</sup>

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1. Haz. M., VIII, p. 97.

2. San., VIII, p. 240.

3. Ibid., pp. 240-41.

4. Ibid., p. 241.

iv. Qatāda and Ibrāhīm al-Nakha'ī held the view that if some of the security has been damaged, the pledger has the right of security to the extent that it has not been damaged.<sup>1</sup>

v. If there is any dispute, the statement of the pledger is accepted. This was held by al-Ḥasan al-Baṣrī.<sup>2</sup> But Ibrāhīm al-Nakha'ī was of the opinion that if the pledgee claims that the pledger has a security with more value than that of the latter's claim, the latter's claim is accepted because the pledgee is claiming a larger value than the pledger's claim. In such a case, if the security is damaged, the statement of the pledgee is accepted, except when the pledger can produce evidence showing the value of the security.<sup>3</sup>

#### The sale of security

Muḥammad b. Sīrīn and Shurayḥ were of the opinion that if the pledgee thinks that the security is being damaged he is allowed to sell it with the permission of the authority. This was also held by al-Thawrī.<sup>4</sup>

#### The security with property of others

According to Ibn Ḥazm, 'Aṭā' b. Abī Rabāḥ, Masrūq,

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1. San., VIII, pp. 241-42.

2. Ibid., p. 243.

3. Ibid.

4. Ibid., pp. 246-47.



al-Sha'bī, Sa'īd b. al-Musayyib and al-Ḥasan al-Baṣrī were of the opinion that a father can utilize or consume, including making a security of his debt, from the property of his children.<sup>1</sup>

#### The dissolution or nullity of al-rahn

According to al-Sha'bī, if the pledger dies leaving a debt after the pledgee has possessed the security, the latter has prior right to take payment for the pledgee's debt out of the security over any other debtors.<sup>2</sup> Therefore, such security is dissolved. According to him, if the pledgee dies the security will be settled by his beneficiaries.<sup>3</sup> If the pledger went bankrupt, the pledgee had the right to the pledged property more than other creditors. This was held by 'Aṭā' b. Abī Rabāḥ.<sup>4</sup>

#### Conclusion

Al-kafāla (suretyship) and al-rahn (pledge or security) interrelate in the case of debt, but they have different functions. In the contract of al-kafāla, a third party becomes surety for the payment of debt, but in al-rahn, the debtor mortgages his own pledge to

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1. Haz. M., VIII, pp. 104-05.

2. San., VIII, p. 241.

3. Haz. M., VIII, p. 100.

4. Um., III, p. 143.

secure the payment of debt. In al-kafala, it has an additional role to secure the guaranteed person in the case of retaliation, lex talionis, to undergo certain punishment.

In al-kafāla and al-rahn, the mutual agreement is the basis for its validity, as in other business transactions. In addition, al-rahn is regarded as a trusteeship. In al-kafāla, the degree or scope of suretyship should be known and should not be with preconditions, but it may be conditional. However, suretyship is limited to any debtor or his agent for the appearance in a lawsuit and to a claim on any debtor for his debt.

In actual fact, the doctrine of earnest money was the origin of the pre-Islamic contract of al-rahn, which was rejected by Islamic law because of an unjust element in it. Such an element may cause the pledger to lose his property. Islamic law, nevertheless, legalizes the contract of al-rahn by promulgating several conditions as prescribed measures to preserve the right of the pledger and the pledgee. Such measures are the permissibility of al-rahn in a journey or otherwise; the right of transient utilization or usufruction of the maintained security, in the case of pledged property being animals; its possession by the pledger is legally required; its durability is until the debt is paid; only its provision and beneficial uses by the pledger are allowed; its nature as property which is not forfeited; and in any case of damage, but no transgression

involved, the pledger loses his right of security and no liability occurs on the pledgee.

In brief, these two pre-Islamic contracts were re-established by the Prophet and their elaborated applications were extended by the later generations, in order to avoid any iniquities to both parties in the contract of loan, especially the creditor. They were two forms of guarantee for the safe return of loans to their owner.



## CHAPTER VIII

### AL-IJĀRA (THE CONTRACT OF HIRING) AND AL-JU'ĀLA (PAY IN RETURN FOR WORK)

This chapter will look into the study of legal theory and practice of al-ijāra (the contract of hiring) and al-ju'āla (pay in return for work). The investigation covers:

I. Al-ijāra (The contract of hiring, Locatio conductio operarum)

1. The definition of al-ijāra, its practice in pre-Islamic times, its origin and its legality;
2. The two types of usufruct in al-ijāra;
3. The conditions for the validity of al-ijāra;
4. Liability of the parties in al-ijāra;
5. Permissible employments and hiring; and
6. Restrictions on al-ijāra.

The above legal theory and practice of al-ijāra include the legal injunctions of the Qur'ān and the theory, practice and their developments which were made by the Prophet, the Companions and the Successors.

II. Al-ju'āla (Pay in return for work, Locatio conductio operis)

1. The definition of al-ju'āla, its legality and

pre-Islamic practice; and

2. The conditions for the contract of al-ju'āla

These conditions consist of the juridical injunctions in the Qur'ān and the evolution of legal decisions which were decreed by the Prophet, the Companions and the Successors.

I. Al-ijāra (The contract of hiring, Locatio conductio operarum)<sup>1</sup>

Al-ijāra and its definition

Literally, al-ijāra derives from al-ajr which means substitute, compensation, recompense, indemnity, consideration, return or counter value (al-‘iwad). In Islamic law, al-ijāra is a contract of proposed and known usufruct with a specified and lawful return or compensation for the effort or work which has been expended.<sup>2</sup>

Mālik stated that al-ijāra is valid in exchange for a determined and certain (thābit) object and clearly specified before the actual contract.<sup>3</sup> Al-ijāra is mere al-bay’,<sup>4</sup> i.e. sale of usufruct,<sup>5</sup> in the sense of

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1. According to Schacht the transaction of kirā’ corresponds to the Roman locatio conductio rei, see Intro., p. 21. According to E. Tyan, the terms isti’jār and kirā’ are less frequently used. See EI<sup>2</sup>, vol. III, p. 1017.
  2. Qas., IV, p. IV, p. 126; Lan., I, p. 24.
  3. Muw. Y., p. 578.
  4. Ibid., p. 595.
  5. Zur., III, p. 368; Intro., p. 154. Coulson defined al-ijāra as the transfer of usufruct for consideration, i.e. rent (ujra) in the case of hire of things and wages (ajr) in the case of hire of persons. See C. Com., p. 22.



al-mubādala (the exchange) i.e. a quid pro quo.<sup>1</sup>

According to Ibn Ḥazm, al-ijāra is valid for anything which possesses manfa'a (beneficial use) which can be hired, utilized and its corpus or substance ('ayn) is not consumed. Goods where the substance does not perpetuate or remain at all are not valid for the contract of al-ijāra, like candles, food or water, which is suitable for sale not for leasing or hiring. Sale confers ownership of substance but in leasing or hiring no such ownership of substance is stipulated or contracted.<sup>2</sup> Mālik<sup>3</sup> and al-Shāfi'ī<sup>4</sup> considered al-ijāra as a sale. Further, al-Kāsānī reported that the people of Medina considered it as a sale.<sup>5</sup> The hirer is called mu'jir, ajir, mukārī or muktarī; the person hiring is musta'jir, the property or service hired is ma'jūr, mu'jar or musta'jar. The remuneration is ujra (rent or hire of things) or ajr (wage in the case of hiring persons). If it is fixed in the contract is called ajr musammā and if it has to be determined by the judge is ajr al-mithl.<sup>6</sup>

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1. Haq., p. 314.

2. Haz. M., VIII, pp. 182-83.

3. Muw. Y., p. 595.

4. Um., IV, p. 26.

5. Kas., IV, p. 174.

6. E. Tyan, EI<sup>2</sup>, vol. III, p. 1017.

Al-ijāra in pre-Islamic times

Some reports show that al-ijāra was practised in pre-Islamic times. Those reports are as follows:

i. Ḥalīma, the Prophet's foster-mother from the tribe of Sa'd, used to say:

"... each woman refused him (the Prophet when he was a small baby) when she was told he was an orphan, because we hoped to get payment (of wet-nursing) from the child's father.<sup>1</sup>

This account showed that the contract of hiring a wet-nurse had been commonly practised among the Arabs in pre-Islamic times.

ii. It was mentioned by Ibn Ishāq that the Prophet, before his prophethood with his foster-brother had shepherded a flock among the tribe of Sa'd.<sup>2</sup> This implies that the Prophet was hired to shepherd the flock. In another report, the Prophet is reported to have said:

"... and I shepherded the flock of sheep of the Meccans and was rewarded with a small sum of money, or in cash (bi

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1. IH., I, pp. 150-51.

2. Ibid., p. 154.

al-qawārīt)."<sup>1</sup>

These reports also shows that al-ijāra was practised by the Arabs in pre-Islamic times.

The origins and the legality of al-ijāra in Islam

The origins of al-ijāra in the Qur'ān are as follows:

- i. "If ye decide on a foster-mother (wet-nurse) for your off-spring, there is no blame on you, provided ye pay (the mother) what ye offered, on equitable terms. But fear God and know that God sees well what ye do."<sup>2</sup>
- ii. "Said one of the women:<sup>3</sup> 'O my (dear) father! engage him on wages: truly the best of men for thee to employ is the (man) who is strong and trusty.' He said: 'I intend to wed one of these my daughters to thee, on condition that thou serve me for eight years; but if

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1. Cf. Muḥammad b. Ishāq, Sīra (Al-Musammāt bi Kitāb al Mubtada' wa al-Mab'ath wa al-Maghāzī, ed. Muḥammad Hamidullah (Konya, 1401/1981), pp. 104-05 (145); IS., I, p. 125; Qas., IV, p. 127.
  2. Q., 2:233.
  3. The women were the daughters of the Prophet Shu'ayb (Jethro the Midianite). See Jam., XIII, p. 270; M. Rodinson, Islam and Capitalism (London, 1974) p. 14.



thou complete ten years, it will be  
(grace) from thee. But I intend not  
to place thee under a difficulty:  
thou wilt find me, indeed, if God wills,  
one of the righteous."<sup>1</sup>

According to al-Shāfi'ī, the above verses show  
clearly that the contract of al-ijāra is lawful in any  
permissible transactions.<sup>2</sup>

iii. (Moses) said (to Khidr):

"If thou hadst wished, surely thou  
couldst have exacted some recompense  
(wage) for it."<sup>3</sup>

The above verse indicates that the contract of  
al-ijāra was already popularly practised in the time of  
Moses.

iv. "Is it they who would portion out the  
mercy of thy Lord? It is We who portion  
out between them their livelihood in  
the life of this world: and We raise  
some of them above others in ranks,  
so that some may command work from others.  
But the mercy of thy Lord is better than  
the (wealth) which they amass."<sup>4</sup>

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1. Q., 28: 26 and 27.

2. Um., IV, p. 26.

3. Q., 18:77.

4. Ibid., 43:32. According to al-Qurtubī, this means  
that the wealthy people could employ, by giving wages,  
to the less well-off people in their works. See  
Jam., XVI, p. 83.

These verses show the legality of al-ijāra in every creed or religion, because of its necessity for natural disposition and the interest for social life among men.<sup>1</sup>

Al-ijāra in the Traditions:

- i. It was reported that the Prophet and Abū Bakr hired 'Abd Allāh b. Arqaṭ, a man of the tribe of al-Di'l (or al-Dīl) b. Bakr as their guide,<sup>2</sup> on the road to Medina, on the day of their migration (al-hijra) from Mecca.<sup>3</sup>
- ii. According to 'Alī b. Abī Ṭālib, after having himself cupped, the Prophet asked him ('Alī) to give the cupper his remuneration or pay.<sup>4</sup>

Two types of usufructs in al-ijāra

Al-ijāra has two types of usufructs:

- i. Property or capital assets (corporeal or personal) (ijāra or manfa'a al-'ayn). For example, houses, residences

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1. Jam., XIII, p. 271.

2. IH., II, pp. 93 and 96; Abū Muḥammad 'Alī b. Aḥmad b. Sa'īd b. Ḥazm, Jawāmi' al-Sīra, ed. Iḥsān 'Abbās and Nāṣir al-Dīn 'Alā' al-Dīn 'Alī b. Hishām al-Dīn (Cairo, 1956), p. 91.

3. IS., I, pp. 229-30.

4. Ah. M., II, p. 84 (692).

or transport.

ii. Labour, employment or service (ijāra or manfa'a al-'amal). For instance, the practical works of an engineer, a carpenter or a tailor.<sup>1</sup>

It is understood that according to al-Shāfi'ī these types of al-ijāra are permissible, because the element of sale, which becomes the principle of al-ijāra as it is a kind of sale, exists in them. Al-Shāfi'ī argued that the above verses, i.e. the first and the second verses of the Qur'ān previously quoted, showed the legality of the above two types of al-ijāra, because of their general nature.<sup>2</sup>

The conditions for the validity of al-ijāra

i. The consent of both parties to the contract. This corresponds to the verse of the Qur'ān:

"Eat not up your property among

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1. E. Tyan, EI<sup>2</sup>, vol. III, p. 1017; Sab., III, pp. 177-78.

2. Um., IV, p. 26. Ibn Ḥazm defended his argument that all beneficial hirings, which consist of the above two types of al-ijāra, were permissible as long as the substance or the corpus of the hired property is not consumed. This legal statement<sup>was</sup> based on the Tradition that the Prophet (permitted) the practice of hiring (al-mu'ājara). The Tradition shows the general permission of hiring by him. See Haz. M., VIII, p. 182.



yourselves in vanities, but let there be amongst you trade by mutual good will."<sup>1</sup>

In addition, the Prophet is reported to have said:

"It is only lawful to take from a brother what he gives you willingly."<sup>2</sup>

ii. The knowledge of the contracted usufruct with an absolute knowledge without any argument about it. It is stated in the Qur'ān:

"He said: I intend to wed one of these my daughters to thee, on condition that thou serve me for eight years."<sup>3</sup>

The above verse implies that both parties had knowledge of the nature of the contracted usufruct.<sup>4</sup>

In addition, the Prophet is reported to have prohibited gharar transactions.<sup>5</sup> Therefore, since al-ijāra constitutes a type of sale, the element of al-gharar is prohibited.<sup>6</sup> The contracted usufruct has to be absolutely ascertained.

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1. Q., 4:29.

2. IH., IV, p. 186.

3. Q., 28:26.

4. Cf. T.J., XX, p. 65.

5. Supra III, pp. 115-72.

6. Muw. Y., p. 595.

iii. Hired goods or works can be delivered or executed legally and practically at a certain time. This precedent was established by the Prophet and Abū Bakr when they hired 'Abd Allāh b. Arqaṭ, a man from the tribe of al-Di'l (or al-Dīl) b. Bakr, as their guide to Medina after three days. In this case, 'Abd Allāh was capable of carrying out his duty and led the Prophet and Abū Bakr to Medina at a certain time.<sup>1</sup> The hired person's capability of discharging the hired goods or fulfilling and performing the work is an essential condition in a contract of al-ijāra.

iv. The capability of handing over the hired goods fully or completely for their usufruction is essential. Therefore, hiring a runaway riding animal or usurped goods is invalid,<sup>2</sup> amounting to al-gharar. Since al-ijāra is a type of sale, i.e. a sale of usufruct, al-gharar is also prohibited in the contract, as ruled by the Prophet.<sup>3</sup>

v. The usufruct must be lawful. This means that any ijāra transaction should not be contracted for any illegitimate purposes. Such unlawful ijāra contract

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1. IH., II, pp. 93-96; Haz. M., VIII, p. 183.

2. Kas., IV, p. 187.

3. Supra III, pp. 115-72.

includes the hiring of an assassin and so on.<sup>1</sup> It is stated in the Qur'ān:

"But help ye not one another in sin  
and rancour and fear God."<sup>2</sup>

Further, the Prophet forbade taking money earned by prostitution.<sup>3</sup> In this case, it is stated in the Qur'ān:

"But force not your maids to  
prostitution when they desire  
chastity, in order that ye may  
make a gain in the goods of this  
life."<sup>4</sup>

vi. The price or rate of hiring or renting a property can be assessed and fixed only when the property is known, whether by inspection, viewing or description. This must be clarified, because the value of the usufruct and the condition for the value must also be known.<sup>5</sup> In this case, the Prophet is reported to have said:

"When you employ or hire an employee  
(or a labourer) you must notify (or  
inform) the employee about his wages  
(or in other cases, rents or hires)."<sup>6</sup>

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1. Kas., IV, p. 190.

2. Q., 5:3.

3. Ah. M., III, p. 350 (2094). This practice had been prevalently practised in pre-Islamic times. See TJ., XVIII, p. 133.

4. Q., 24:33.

5. Kas., IV, p. 193.

6. Han. M., p. 161 (339); J. Ma., II, pp. 42-43; San., VIII, p. 235.



vii. The amount of rent or salary should be in accordance with the convention or the tradition of the locality and must be just and acceptable to both parties.<sup>1</sup> To support this statement, it is stated in the Qur'ān:

"And if they suckle your (offspring),  
give them their recompense and take  
mutual counsel together, according  
to what is just and reasonable."<sup>2</sup>

However, in the case of selling riding animals, the purchaser is not allowed to charge any fees or rents from the vendor by riding his newly bought animal, to deliver it to him. This was the practice of the Prophet.<sup>3</sup>

viii. It is permissible to stipulate conditions for expediting the payment for hiring or for salary and its delay or deferment, as agreed by the parties.<sup>4</sup> This view corresponds to the Tradition from the Prophet:

"Muslims are bound by their  
contractual agreements."<sup>5</sup>

ix. If any labourer, hireling, employee (al-ajīr), lessor or landlord (al-mu'ajjir) or an employer, leaseholder, lessee, hirer or tenant (al-musta'jir) dies, or if rented or leased goods or objects have been damaged or bought or have

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1. Kas., IV, pp. 193-94.

2. Q., 65:6.

3. San., VIII, p. 60.

4. Cf. Haz. M., VIII, pp. 183-84; Kas., IV, pp. 203-04.

5. Cf. Haz. M., VIII, p. 414; Kas., IV, p. 203; Sab., III, pp. 188-89.

not been in possession of the employer, lessor, then the contract of al-ijāra is void. The remainder of the period of leasing or renting should be presented as a donation or a charitable gift.<sup>1</sup> On this matter, it is mentioned in the Qur'ān:

"Every soul draws the meed of its  
acts on none but itself."<sup>2</sup>

This subject corresponds to the Tradition of the Prophet:

"Your blood and your property are  
sacrosanct."<sup>3</sup>

On the basis of this evidence, from the above Tradition, Ibn Ḥazm argues that the contract of al-ijāra is void whenever either of the parties dies or the object of al-ijāra becomes damaged.<sup>4</sup>

x. If there arises the necessity in an emergency, for the lessee, tenant or employee, or lessor, landlord or employer to emigrate, the contract of al-ijāra will be dissolved. The contract will also be rescinded if any damage, loss, disadvantage or detriment to either of the parties, should occur, such as preventive sickness

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1. Haz. M., VIII, p. 184.

2. Q., 6:164.

3. IH., IV, p. 185.

4. Haz. M., VIII, p. 184.

or impediment through fear and so on.<sup>1</sup> On this matter, it is stated in the Qur'ān:

"When He (God) hath explained to you in detail what is forbidden to you, except under compulsion of necessity."<sup>2</sup>

#### Liability of the parties in al-ijāra

There is no liability on a lessee, employee or tenant, whether he is a partner or not, except when it is established that he has transgressed or wasted and damaged the property. In such cases he is liable to replace the property.<sup>3</sup> This corresponds to the Tradition of the Prophet:

"Your blood and your property are sacrosanct."<sup>4</sup>

In relation to this, it is stated in the Qur'ān:

"Eat not up your property among yourselves in vanities."<sup>5</sup>

It is reported that the Prophet said:

"There is no liability on a bleacher (qaṣṣār), a dyer (ṣabbāgh) and the vendor of painted fabrics (washshā')."<sup>6</sup>

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1. Haz. M., VIII, p. 187.

2. Q., 6:119.

3. Haz. M., VIII, p. 201.

4. IH., IV, p. 185.

5. Q., 4:29.

6. J. Ma., II, p. 49.



Permissible employments and hiring

1. Wages or salary from the works of obedience to God

It is permissible to take wages or salary for teaching the Qur'ān, any knowledge of religion, or the practising of it. Such practice is permitted because it implies a leasing or renting (isti'jār) for a specified job or piece of work with a known or specified expenditure.<sup>1</sup> The precedent for such practice was contained in the Tradition:

"Some of the Companions of the Prophet (went on a journey and) passed by a tribe. A man from the tribe had been bitten (by a snake or a scorpion) or seriously injured and a man from the tribe came to them and said: is there anyone among you who can recite a divine speech as a means of curing diseases (rāq). One of the Companions then went and recited Fātiḥat al-Kitāb (Surat al-Fātiḥa, the first chapter of the Qur'ān), for a flock of sheep. Later, the reciter of a divine speech (rāq) came back with the sheep to his friends who disapproved of this practice. They said: 'Did you take wages through the Book of God (the Qur'ān)?' They asked the Prophet: 'O! Messenger of God, is it permissible to take wages on the Book of God?' The Prophet replied:

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1. Haz. M., VIII, pp. 193-94; Kas., IV, pp. 191-92.

'You have taken wages from the most permissible thing, the Book of God.'

In another Tradition the Prophet married a woman to a man with whose dowry was his knowledge of the Qur'ān (i.e. after the man taught the woman the knowledge of the Qur'ān).<sup>1</sup>

The above Traditions show the legality of paying a salary for religious work.

ii. Employing a wet-nurse (al-zi'r)

As already noted, to employ a wet-nurse is permissible,<sup>2</sup> because it is stated in the Qur'ān:

"If ye decide on a foster-mother (wet-nurse) for your offspring, there is no blame on you, provided ye pay (the foster-mother) what ye offered, on equitable terms."<sup>3</sup>

In another verse, it is stated:

"And if they suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable."<sup>4</sup>

The following conditions could be concluded from

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1. Haz. M., VIII, pp. 193-94.
  2. Ibid., p. 189.
  3. Q., 2:233.
  4. Ibid., 65:6.

the above verses:

a. It is permissible to employ a wet-nurse, other than the baby's mother on payment of a specified wage.<sup>1</sup>

These wages may include the wet-nurse's food and clothes. The unspecified wages may be settled by mutual agreement between the two parties.

b. It is required that the parties know the period of wet-nursing and the baby's place of wet-nursing should also be known.

c. A wet-nurse is a specified employee. She is not allowed to suckle any other baby.

d. A wet-nurse is also responsible for any other necessary services for the baby, such as bathing, cloth-washing and cooking food. The father is obliged to provide food and other necessary provisions, such as toiletry and perfume. Should either the baby or the wet-nurse die, the contract of wet-nursing is dissolved.

e. It is not permissible for a man to employ his wife as a wet-nurse,<sup>2</sup> because the wife is already being maintained by the husband.<sup>3</sup>

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1. Cf., T.J., II, p. 509; Jam., III, p. 173.

2. Sab., III, pp. 190-92.

3. Kas., IV, p. 192.



iii. Renting of riding animals, vehicles or dwelling houses

It is permissible to rent a riding animal or vehicle, even though without specification of distance or place of journey, or a house for dwelling for a certain period, because no prohibition against such renting was made by the Prophet. This type of renting is included in the general order or permission of the Prophet on the legality of letting, leasing, hiring out or letting on lease (al-mu'ājara).<sup>1</sup> However, such renting or tenure is to be usufructed by the leaseholder, tenant or lessee only or to be sub-letted to others with any amount of rent; unless the contract does not permit usufruction or sub-letting by others.<sup>2</sup> This renting or leasing applies also to tailoring or dressmaking (al-khiyāṭa) and weaving (al-nasj), even though without specification of the period of such renting.<sup>3</sup>

iv. The practice of cupping

According to Abū Ḥanīfa, al-Shaybānī<sup>4</sup> and al-Shāfi'ī,<sup>5</sup> payment for cupping is permissible because the practice of cupping is permitted. It has already been mentioned

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1. Haz. M., VIII, p. 197.

2. Haz. M., VIII, p. 197; cf. Sab., III, pp. 163-64.

3. Haz. M., VIII, p. 183.

4. Muw. Sh., p. 342.

5. M. in Um., VIII, p. 394.

that according to 'Alī b. Abī Ṭālib, after the Prophet had himself cupped, the Prophet asked him to give the cupper (ḥajjām) his pay or remuneration.<sup>1</sup> But the Prophet disallowed such practice in another Tradition.<sup>2</sup>

Al-Shaybānī opined that the Tradition, which had prohibited taking payment for cupping, was abrogated (mansūkh) by the Tradition which allowed such practice.<sup>3</sup> In this case, al-Shāfi'ī showed his disciplined and judicious appreciation of broader systematic consistency of reasoning by arguing that there was no abrogation in this case. In the Tradition which was reported by Mālik, the Prophet <sup>had</sup> said, after he had disallowed a man from the tribe of Hāritha to give payment for cupping, "Feed the ones who drive your water-carrying camels," meaning "your slaves".<sup>4</sup> According to al-Shāfi'ī, this means that the Prophet disapproved of such work, rather than prohibited it, because of its inferior nature and then it should be refrained from it.<sup>5</sup>

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1. Cf. J. Ma., II, p. 49; Muw. Sh., p. 342; cf. Muw. Y., p. 831; Ah. M., II, pp. 84 (692); cf. p. 259 (1129 and 1130) and p. 262 (1136); IV, p. 62 (2249).
  2. Muw. Y., p. 832.
  3. Huj., II, pp. 755-68.
  4. Muw. Y., p. 832.
  5. M. in Um., VIII, p. 668.

v. Hiring or leasing of collective ownership or joint-tenancy (al-mūshā')

It is permissible for a property held in collective ownership or joint-tenancy to be hired or leased by a partner or others to a partner or others, whether the property has been divided or not. Such al-ijāra is permissible, because of the general order of permission given by the Prophet in al-ijāra.<sup>1</sup>

vi. Employing for sweeping public lavatories

Ibn Ḥazm argues that it is permissible to hire a worker to sweep public lavatories and to give wages for it. Such hiring or employment is allowed, because of the general permission of al-ijāra by the Prophet.<sup>2</sup>

The Companions

The Companions recognized the legality of al-ijāra and they continued to practise it, as the Prophet had permitted. No comment was made by the Companions except as follows:

Liability of the parties in al-ijāra

‘Umar b. al-Khaṭṭāb and ‘Alī b. Abī Ṭālib were of the opinion that the hireling, labourer and employee (al-ajīr), including producers, manufacturers (al-ṣunnā'),

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1. Haz. M., VIII, p. 201.

2. Ibid., p. 198.



guard, keeper, caretaker or shepherd (al-ḥāfiẓ or al-rā'ī), porter (al-ḥammāl), bleacher (al-qasṣār), goldsmith or jeweller (al-ṣā'igh) were liable to replace any hired object which had been damaged,<sup>1</sup> so as to be on the safe-side and to safeguard the owners.<sup>2</sup> 'Alī added that the rule also applied to the washer (al-ghassāl), the dyer (al-ṣabbāgh),<sup>3</sup> the tailor (al-khayyāt) and the like.<sup>4</sup> However, 'Alī b. Abī Ṭālib ruled that the bleacher (al-qasṣār), the dyer (al-ṣabbāgh), the engraver (al-ḥā'ik)<sup>5</sup> and the goldsmith or the jeweller (al-ṣā'igh)<sup>6</sup> were not liable in such a case, presumably, if they did not cause any damage or transgression.

#### Permissible employment and hiring

##### i. Wages or salary from the works of obedience to God

The Companions allowed people to take wages or salary for teaching the Qur'ān, religious studies or the practising of it. They were Sa'd b. Abī Waqqāṣ,<sup>7</sup> 'Umar b. al-Khaṭṭāb and 'Ammār b. Yāsir.<sup>8</sup> To support this

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1. Um., IV, pp. 38-39; San., VIII, pp. 217-18; Haz. M., VIII, p. 202.
  2. San., VIII, p. 217; Haz. M., VIII, p. 203.
  3. Um., IV, p. 41.
  4. San., VIII, p. 217.
  5. J. Ma., II, p. 50.
  6. Ath., p. 158 (721).
  7. Mud., IV, p. 419.
  8. Haz. M., VIII, p. 195.

opinion, 'Umar used to employ a mu'adhdhin (the caller for prayer).<sup>1</sup> However, the disapproval of 'Umar b. al-Khaṭṭāb and 'Alī b. Abī Ṭālib<sup>2</sup> in certain instances may have been to discourage people from using the opportunity of teaching religious studies to exploit others in the name of religion. But it was permissible if it was for the propagation of religion. Salary for such teaching was also permitted to be taken if it was for the maintenance of the teachers themselves and their family.

ii. Hiring in the form of food

Abū Hurayra permitted payment for any hiring or salary in the form of food.<sup>3</sup> This ruling may also have been extended to any hiring or salary in the form of clothing.

iii. Renting of riding animals

'Umar b. al-Khaṭṭāb, or 'Abd Allāh b. 'Umar, allowed the return of rent in an ijāra contract before usufruction, if the hired object was a riding animal.<sup>4</sup> 'Umar b. al-Khaṭṭāb added that neither party was liable to replace the riding animal which had died.<sup>5</sup> According to 'Alī b. Abī Ṭālib if the hirer had put a condition to

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1. Mud., IV, pp. 420-21.

2. San., VIII, p. 115; Haz. M., VIII, p. 195.

3. San., VIII, pp. 215-16.

4. Um., IV, p. 31.

5. Mud., IV, p. 476.

reach the destination but the riding animal failed to do so, the hirer can pay the hire as far as the distance he rode the animal or reached. But if he had not put any condition, the owner had the right to claim the full hire from him.<sup>1</sup> This can be applied to any vehicle. The dissolution of such a contract is permitted by mutual consent of the parties.<sup>2</sup>

iv. The practice of cupping

The Companions permitted, as did the Prophet, the payment for cupping. Some of the Companions who permitted such practice were 'Uthmān b. 'Affān and 'Abd Allāh b. 'Abbās.<sup>3</sup> However, 'Uthmān b. 'Affān<sup>4</sup> and Abū Hurayra<sup>5</sup> disapproved of such practice, because of the inferior nature of such work during their times.

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1. Mud., IV, p. 476.

2. According to al-Shāfi'ī, the contract is valid and durable, even after either or both of the parties die, unless there is mention in the contract of the duration or the time of dissolution of contract. See Um., IV, p. 31. It may be suggested that such a condition also applies to other ijāra contracts.

3. Haz. M., VIII, p. 193.

4. M. in Um., VIII, p. 668.

5. Haz. M., VIII, pp. 192-93.



v. Employing for sweeping public lavatories

‘Abd Allāh b. ‘Abbās and ‘Abd Allāh b. ‘Umar discouraged this employment.<sup>1</sup> It is possible to suggest that such employment was considered as lowly and inferior during their times.

Restrictions on al-ijāra

Excess of payment in al-ijāra

‘Abd Allāh b. ‘Umar did not allow the employee to take any excess of payment, i.e. in excess of the amount previously agreed between the parties, in a contract of al-ijāra.<sup>2</sup> This was the extended ruling by the Companions, which had not been instructed by the Prophet.

The Companions made their rulings as regards the above conditions only, but they left other areas of al-ijāra which had been dealt with by the Prophet. This may indicate that they just followed them, without making further rulings.

The Successors

The Successors, as the Companions, recognized the legality of al-ijāra and continued to practise it. They developed such practice by giving extended rulings. Those rulings were as follows:

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1. Haz. M., VIII, p. 198.

2. Ibid., p. 197.

The conditions for the validity of al-ijāra

- i. The amount of wages or rent and the duration of employment or renting must be fixed. This was held by Ma'mar b. Rāshid and al-Thawrī.<sup>1</sup>
- ii. It is not permissible to put a condition that if an employed person carries food from one place to another, but then, because he fails to bring it at a specified time, the property is considered as having been sold to him. This was held by al-Zuhrī and al-Thawrī.<sup>2</sup> Shurayḥ and 'Aṭā' b. Abī Rabāḥ permitted any precondition which does not force the employee to carry out his duty unjustly.<sup>3</sup>
- iii. It is permissible to hire an employee to bring property from one place to another or for other employment at a fixed time and giving extra wages when the time has expired. However, it is not permissible to pay less than the agreed wages to an employee who has carried out the duty in a shorter time than the specified one. This was held by Qatāda.<sup>4</sup> According to Shurayḥ the extra wages have to be given to any employee who has carried out any extra work.<sup>5</sup>

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1. San., VIII, p. 214.

2. Ibid., p. 59.

3. Ibid., pp. 59-60.

4. Ibid., p. 59.

5. Ibid., p. 212.

iv. The employee is paid the wages, even though his employer has gone together with him and the former has not transported the goods by his vehicle. This was held by Sufyān al-Thawrī.<sup>1</sup> According to Ma'mar b. Rāshid, in this case, the employer must be satisfied with the amount of work or labour, which has been carried out by the employee.<sup>2</sup>

v. Sale will discontinue the contract of hiring. This was held by al-Ḥasan al-Baṣrī and al-Thawrī.<sup>3</sup> Al-Sha'bī added that death will also discontinue the contract of hiring.<sup>4</sup> However, if the lessee dies before the expiration of the agreed time of renting, the contract does not dissolve. This was the view of Muḥammad b. Sīrīn.<sup>5</sup>

vi. It is allowed to an employee to make any condition for his maintenance in a journey to carry out his duty, as long as such maintenance is in the form of food. This opinion was held by al-Zuhrī.<sup>6</sup>

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1. San., VIII, p. 214.

2. Ibid.

3. Ibid., p. 191.

4. Ibid.

5. Haz. M., VIII, p. 184.

6. San., VIII, p. 216.



vii. The employee has the right to the payment of salary in as much as he has carried out the work, after the rest of the work has become defective. This was the opinion of Qatāda and Ma'mar b. Rāshid.<sup>1</sup>

viii. If the employee fails to carry out the agreed job, he is not entitled to any pay. This was held by Ma'mar b. Rāshid and Qatāda.<sup>2</sup>

Liability of the employee (al-ajīr) or the renter in  
al-ijāra

i. According to Ibrāhim al-Nakha'ī if any loaned shoes are damaged, the borrower is not in any way liable. But if he has rented them with certain payment, after their damage he is liable to replace them.<sup>3</sup>

ii. The renter will not be liable to replacement of any goods which have been damaged accidentally. This was held by Shurayh<sup>4</sup> and 'Aṭā' b. Abī Rabāh.<sup>5</sup> The Seven Jurists of Medina and Shurayh added that the renter or lessee is liable to replace the rented goods if he made any transgression, transgredi, on them and broke the

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1. San., VIII, p. 294.

2. Ibid.

3. Ibid., p. 220.

4. J. Ma., II, p. 50; San., VIII, p. 171.

5. Cf. M. in Um., VIII, p. 226.

preconditions of the employer or the owner not to bring the (rented) goods or object to such and such a place, and then the goods were damaged from the result of such breach.<sup>1</sup>

iii. Shurayh<sup>2</sup> and 'Aṭā' b. Abī Rabāh<sup>3</sup> decided that the employee is liable to pay or replace as much as the amount of property which has been transgressed by him.

iv. The employer had to accept whatever the employee brought back to him at any time if no prior conditions had been made. This was held by al-Ḥakam b. Utayba.<sup>4</sup>

But if a condition had been made, the acceptance of such goods by the employer depended on such condition. In this case, no liability will have incurred on the employee for any other reasons. This was held by Ma'mar b. Rāshid and al-Thawrī.<sup>5</sup> According to al-Sha'bī, the employee is liable to replace or pay for any transgression and he has no right to any wages, in such a case.<sup>6</sup>

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1. Mud., IV, p. 491.

2. San., VIII, p. 212.

3. Um., IV, p. 41.

4. San., VIII, p. 212.

5. Ibid.

6. Ibid., p. 213.

v. According to Qatāda any paid employee is liable to replace any lost property.<sup>1</sup> But Ibrāhīm al-Nakha'ī decided that a servant is exempted from such liability. However, al-Sha'bī, Shurayh<sup>2</sup> and Sulaymān b. Yasār<sup>3</sup> were of the opinion that the employee is liable to replace or pay<sup>for</sup> any transgression or damage to the property which has been made by himself. Muḥammad b. Sīrīn was of the opinion that there is no liability on an employee, except in the case of loss.<sup>4</sup> Al-Sha'bī added that there is no liability on a monthly paid employee (ajīr al-mushāhara).<sup>5</sup>

vi. According to Shurayh in the case of a bleacher (qaṣṣār), who has caused damage to any cloth or garment or has burnt it, he is liable to replace it with material of the same quality as that which he damaged. Such replacement may be made with money <sup>equivalent</sup> at the price. Amicable settlement is also encouraged, where possible.<sup>6</sup> Al-Sha'bī agreed with such a ruling. But he added that there was no liability in the case of accident.<sup>7</sup> According to

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1. San., VIII, p. 216.

2. Ibid., pp. 217-18.

3. Mud., IV, pp. 388-89.

4. Haz. M., VIII, p. 201.

5. Ibid., pp. 201-02.

6. Cf. J. Ma., II, p. 50; cf. Um., IV, p. 41; San., VIII, p. 219.

7. Haz. M., VIII, p. 202.



Qatāda, if a bleacher has torn the cloth he is liable to sew it, in the case of its being threadbare or worn, but he is to replace it where it is new.<sup>1</sup> Masrūq was of the opinion, in this case, that the bleacher has a debt to pay to the owner of such cloth for any shortfall or defect.<sup>2</sup>

In the case of weaving, if a weaver has been given a spun thread and he spoils the weaving or braiding, he is to replace such damaged material with thread of the same quality as the previous spun thread, even though he has repaired or improved it. This was held by Shurayḥ.<sup>3</sup> According to Shurayḥ, any hired cloth or garment which has been damaged or torn by the lessee is also liable to be replaced.<sup>4</sup> In the case of inter-transgression between the parties of bi-lateral hiring, each of them has to replace each other's garment. This was also the opinion of Shurayḥ.<sup>5</sup> According to Ibrāhīm al-Nakha'ī, there is no liability on the jeweller (al-ṣā'igh), the bleacher (al-qasṣār), the tailor (al-khayyāṭ) and others.<sup>6</sup> Al-Ḥasan al-Baṣrī was of the opinion that al-qasṣār is liable to replace or pay any damage caused by him, but he is not liable to such replacement in the case of submersion, an unprecedented accident and presumptuous

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1. San., VIII, p. 219.

2. Ibid.

3. Ibid.

4. Ibid., p. 220.

5. Ibid.

6. Haz. M., VIII, p. 201.

enemy.<sup>1</sup> Ṭāwūs ruled that there was no liability on the bleacher,<sup>2</sup> but Qatāda said that a liability should be imposed in the case of loss.<sup>3</sup> In addition, Shurayḥ decided that the dyer (al-ṣabbāgh), whose house is burnt or caught fire, has no liability to pay or replace any cloth of his customer.<sup>4</sup> But according to him, the bleacher and the tailor are liable to replace any damage.<sup>5</sup> In the case of manufactured goods, Ibrāhīm al-Nakha'ī was of the opinion that any manufacturers (al-ṣunnā') are liable to pay or replace any defective goods.<sup>6</sup>

vii. According to Ibrāhīm al-Nakha'ī, the surety for liability from the employee or the lessee depends on the payment of wages or rent in advance.<sup>7</sup> He said that the owner of any goods, which have been looked after by a paid managing agent (mustabdi') has a right of replacement or payment for their loss or damage.<sup>8</sup> According to him, joint or collective employees are also liable to pay or replace damaged goods.<sup>9</sup>

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1. Haz. M., VIII, p. 202.

2. Ibid.

3. Ibid.

4. Ath., p. 156 (714); San., VIII, p. 221.

5. Mud., IV, p. 389.

6. Haz. M., VIII, p. 202.

7. San., VIII, p. 221.

8. Ibid.

9. Haz. M., VIII, p. 202.

viii. According to Shurayḥ, there is no liability on a seaman or mariner (al-mallāḥ) in the case of drowning or an unprecedented accident.<sup>1</sup>

ix. There was no liability on a hired shepherd, unless if he sold or slaughtered the sheep. This was held by Sa'īd b. al-Musayyib, 'Aṭā' b. Abī Rabāḥ and Shurayḥ.<sup>2</sup>

According to al-Zuhrī, the paid shepherd has no liability to replace or pay for any lost animal. But, in this case, Shurayḥ gave a ruling that the claimant must produce evidence to support his claim, before his claim can be accepted.<sup>3</sup>

#### Permissible employment and hiring

i. Wages or salary from the works of obedience to God

Tāwūs, Qatāda,<sup>4</sup> 'Aṭā' b. Abī Rabāḥ and al-Ḥasan al-Baṣrī<sup>5</sup> allowed taking wages for teaching children Qur'ānic studies, without any unjust precondition. In cases where this has been done with any unjust precondition,<sup>6</sup>

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1. Haz. M., VIII, p. 202.

2. Mud., IV, p. 439.

3. San., VIII, pp. 220-21.

4. Ibid., pp. 114-15.

5. Mud., IV, p. 419; Haz. M., VIII, p. 195.

6. Haz. M., VIII, p. 195.



Ibrāhīm al-Nakha'ī did not allow such employment.<sup>1</sup>

This was also agreed by Shurayh and Muḥammad b. Sīrīn, if it is made with an unjust condition.<sup>2</sup>

ii. Hiring clothes and riding animals or vehicles

a. The hiring of clothes, riding animals or vehicles is counted as being within the duration of the agreed period, even though the lessee does not use them during that time, because he prevents others from usufruction and the hiring of them within such time. This was held by al-Thawrī.<sup>3</sup>

b. If the lessee dies on the journey, after he has hired a riding animal, or a vehicle, his family or guardian has to pay the rent, in accordance with the length of time during which he has usufructed it. This was held by al-Zuhrī and al-Thawrī.<sup>4</sup>

c. If the lessee goes on a journey shorter than that to the place which has been agreed, he is allowed to pay the rent of the riding animal for the journey to the second place only. This was the opinion held by al-Sha'bī.<sup>5</sup> But if the lessee rode further than

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1. San., VIII, p. 114.

2. Haz. M., VIII, p. 195.

3. San., VIII, p. 213.

4. Ibid.

5. Ibid.

the original place agreed, he was indebted and obliged to pay for the extra journey. This was held by the Seven Jurists of Medina. Further, they added that if the animal died during such an excess journey, the lessee was liable to replace it and pay the lease or hire to cover the first agreed distance only, not the surplus journey.<sup>1</sup> 'Aṭā' b. Abī Rabāḥ opined that the lessee was liable to replace any riding animal which had died within the excess journey, even though the excess was minimal.<sup>2</sup> But if the lessee hired the animal from another person who had hired it from its owner, and the second hiring was made without prior permission from the latter, and then the animal died within the agreed distance of the journey, the second lessee or hirer was not liable to replace it. This was held by 'Amr b. Dīnar and 'Aṭā' b. Abī Rabāḥ.<sup>3</sup>

d. If the riding animal has been rented, but it refuses to go on the journey, the lessee is not obliged to pay the rent. This view was held by Qatāda.<sup>4</sup>

### iii. Payment for surgery

The Seven Jurists of Medina permitted any payment for any surgery, after the patient's recovery. Such

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1. Mud., IV, p. 483.

2. Ibid.

3. Ibid.

4. San., VIII, p. 216.

payment was considered as the payment for treatment of illness.<sup>1</sup>

iv. Employment with suretyship

It is permissible to make a contract of hiring or leasing with suretyship, as long as the rent or lease is paid in cash and not on credit. This was held by al-Ḥasan al-Baṣrī.<sup>2</sup>

v. Employment of a weaver, a shepherd and a nurse for palm-trees.

a. Muḥammad b. Sīrīn, 'Aṭā' b. Abī Rabāḥ and Qatāda were of the opinion that there is no harm in employing a weaver (al-nassāj) with an agreed amount of payment, by giving an amount of material for making clothes or dress.<sup>3</sup>

b. Al-Ḥasan al-Baṣrī allowed employing a shepherd to tend a flock of sheep or goats, at an agreed amount of payment.<sup>4</sup>

c. Sa'īd b. al-Musayyib allowed the employment of people to nurse or treat palm-trees medically, at a fixed amount of payment, as long as such payment was not taken from their future produce. This was also held by Ibrāhīm

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1. Mud., IV, p. 422.

2. San., VIII, p. 216.

3. Haz. M., VIII, p. 199.

4. Ibid.



al-Nakha'ī and al-Ḥasan al-Baṣrī.<sup>1</sup>

Restrictions on al-ijāra

Sa'īd b. al-Musayyib, al-Ḥasan al-Baṣrī, Muḥammad b. Sīrīn,<sup>2</sup> Khārija b. Zayd b. Thābit and Mujāhid<sup>3</sup> forbade taking wages ~~against~~ settling the shares of partnership in a property or shares in inheritance. Ibrāhīm al-Nakha'ī forbade hiring a female mourner (al-nawwāḥa) and a female singer (al-mughanniya).<sup>4</sup>

The profit taking from al-ijāra

a. Muḥammad b. Sīrīn prohibited a paid employee employing another person, by paying the latter less than the first actual wages or taking the profit from the latter.<sup>5</sup> Ibrāhīm al-Nakha'ī, al-Sha'bī and Mujāhid also did not allow such practice, unless a new piece of work or a different kind of work is to be carried out by the second worker.<sup>6</sup> Such ruling was, possibly, to avoid any exploitation. But Ṭāwūs, al-Ḥasan al-Baṣrī,<sup>7</sup> Sulaymān b. Yasār, 'Urwa b. al-Zubayr and 'Aṭā' b. Abī Rabāḥ<sup>8</sup> allowed such a practice.

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1. Haz. M., VIII, p. 199.

2. San., VIII, p. 115.

3. Mud., IV, p. 423.

4. San., VIII, p. 116.

5. Ibid., p. 222.

6. Ibid.

7. Ibid.

8. Haz. M., VIII, p. 198.

b. Ibrāhīm al-Nakha'ī,<sup>1</sup> Muḥammad b. Sīrīn, Shurayḥ, al-Sha'bī,<sup>2</sup> Mujāhid, 'Ikrima, Sa'īd b. al-Musayyib and Masrūq<sup>3</sup> did not allow hiring a property which the lessee subsequently leases to another person with more rent than the lessee has himself paid. Ibrāhīm al-Nakha'ī considered such practice as usury and ruled that such profit belongs to the owner of the property.<sup>4</sup> Such ruling was possibly to avoid causing any injustices to the first and the third parties. But 'Aṭā' b. Abī Rabāḥ and Nāfi' allowed such a practice.<sup>5</sup> Further, 'Aṭā' b. Abī Rabāḥ and al-Zuhrī allowed re-letting, or sub-letting of a house for more rent than the former actual rent,<sup>6</sup> as long as both parties consent to and agree with it.

II. Al-ju'āla; al-ja'āla; al-ji'āla or al-ju'l (Reward or pay, remuneration or compensation in return for work,<sup>7</sup> Locatio conductio operis)<sup>8</sup>

The definition of al-ju'āla

Literally, al-ju'āla constitutes wage, pay,

1. J. Ma., II, p. 50.
2. San., VIII, p. 223.
3. Haz. M., VIII, p. 197.
4. San., VIII, p. 223.
5. Mud., IV, p. 417.
6. Ibid., pp. 515-16.
7. Lis., XI, p. 111; Lan., I, p. 431.
8. J. Schacht, 'The Law' in Unity and Variety in Muslim Civilization, ed. Gustave E. Von Grunebaum (Chicago, 1955), p. 71.

stipend<sup>1</sup> or reward, but legally, al-ju'āla is a contract for the beneficial use or profit which is assumed for its attainment or achievement. For instance, a man engages in a contract of al-ju'āla when he gives a specified reward to another man to return or reinstate his lost property, his straying animal,<sup>2</sup> or to build for him a hall, to treat or cure a patient until he recovers from an illness, or so on.<sup>3</sup> This contract corresponds to the Roman locatio conductio operis.<sup>4</sup>

The legality of al-ju'āla and its practice in pre-Islamic times

Evidence for the legality of al-ju'āla may be found in the Qur'ān and the Tradition:

i. In the Qur'ān:

"For him who produces it, is (the reward of) a camel-load; I will be bound by it."<sup>5</sup>

ii. In the Tradition, the Prophet was reported to have permitted al-ju'l to return lost property or a runaway slave.<sup>6</sup> He also decreed that anyone who found any

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1. Lan., I, p. 431.

2. Cf. Um., IV, p. 75; cf. Haz. M., VIII, p. 204.

3. Sab., III, p. 351.

4. Intro., p. 21.

5. Q., 12:72.

6. J. Ma., II, pp. 73-74.



runaway slave in the Holy Lands (in Mecca and Medina), should be rewarded with ten dirhams,<sup>1</sup> or if outside the Holy Lands with a dīnār.<sup>2</sup>

The legality of al-ju'āla is based on recognition of its necessity (ḍarūra).<sup>3</sup> On this basis it is permitted with the existence of certain elements of uncertainty, though it is not allowed in other areas of the law.<sup>4</sup> In this case, an uncertain work may be carried out.<sup>5</sup> Al-ju'āla is allowed as an exception. Islamic law does not, on principle, recognize the uncommissioned or unauthorized agency (bay' al-fuḍūlī, negotiorum gestor) of a stranger as a source of obligations, but the commissioner (or the principal) may approve the act of an uncommissioned agent and thereby make it valid and permissible.<sup>6</sup> The contract of al-ju'āla was based on a public offer of reward.<sup>7</sup>

In this contract, two elements of certainty, however, exist, namely, the amount of reward offered and a specified service to be accomplished. In addition, the amount of work to be carried out and its duration are unknown in this contract.<sup>8</sup> It appears to suggest that

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1. San., VIII, p. 208.

2. Huj., II, p. 741.

3. Jam., IX, p. 232.

4. Ibid.

5. Jam., IX, p. 232; Sab., III, p. 352.

6. Intro., p. 159; supra chapter V, pp. 257-60.

7. Islamic law imposed the obligation of paying a reward for bringing back a fugitive slave. Later, the reward was fixed at forty dirhams for such works. See Intro., pp. 159-60.

8. C. Com., p. 24.

this contract had been commonly practised in the times prior to Islam, since the time of the prophet Joseph.<sup>1</sup>

The conditions for the contract of al-ju'āla

i. The parties, in a contract of al-ju'āla, are not obliged to be present at the time of carrying out the contract.<sup>2</sup> This legal view is based on the verse of the Qur'ān:

"For him who produces it, is (the reward of) a camel-load."<sup>3</sup>

ii. Al-jā'il (the reward payer) is obliged to pay rewards, after al-maj'ūl lah (the worker) has carried out the job of finding the lost property.<sup>4</sup> In this case, it is mentioned in the Qur'ān:

"O ye who believe! Fulfil (all) obligations."<sup>5</sup>

In another verse:

"They said: We miss the great beaker of the king; for him who produces it, is (the reward of) a camel-load; I will be bound by it."<sup>6</sup>

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1. Cf. Q., 12:72.

2. Jam., IX, p. 232; Sab., III, p. 204.

3. Q., 12:72.

4. Haz. M., VIII, p. 204.

5. Q., 5:1.

6. Ibid., 12:72.

iii. If anyone abandons an animal and it is found by another person who gives a new life to the animal, then the latter is considered to be its owner. In this case, the Prophet is reported to have said:

"Whoever gives a new life to an animal (which he has found and it has been abandoned by its owner), it belongs to him."<sup>1</sup>

The Tradition shows that al-ju'āla does not apply to any property which has been abandoned by its owner in the first place. Any subsequent claim by al-maj'ūl lah or al-jā'il will not be accepted.

iv. The worker (al-maj'ūl lah) is not allowed to buy the lost property which has not yet been found.<sup>2</sup> The Prophet forbade buying a runaway slave,<sup>3</sup> who has not been found.

#### The Companions

The Companions also acknowledged the legality of al-ju'āla. 'Abd Allāh b. Mas'ūd ruled that the payment was forty dirhams for finding lost property outside of a town.<sup>4</sup> 'Abd Allāh b. 'Umar<sup>5</sup> also used to decide on al-ju'l or

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1. San., VIII, p. 210.

2. Cf. Haz. M., VIII, p. 204.

3. San., VIII, p. 211.

4. Ath., pp. 165-66 (760 and 761); Huj., II, pp. 734-37 and 740-41; San., VIII, p. 208.

5. Huj., II, pp. 741-42.



al-ju'āla with certain amount of reward or pay.

The conditions for the contract of al-ju'āla

i. No comment was made by the Companions on the conditions for the parties, in a contract of al-ju'āla, who are not obliged to be present at the time of contract; al-jā'il (the reward payer) is obliged to pay rewards, after al-maj'ūl lah (the worker) has carried out the job of finding the lost property; and if anyone abandons an animal and it is found by another person who gives a new life to the animal, then the latter is considered to be its owner. This may suggest that they agreed on these matters and followed the instructions of the Prophet.

ii. 'Alī b. Abī Tālib was of the opinion that al-maj'ūl lah (the worker) was not liable to replace or compensate any property or animal which was lost from his hands, after he had found it earlier.<sup>1</sup> This was an extensive ruling by the Companions, because none had been made by the Prophet.

The return of lost property

The return of lost property by a finder to its owner, with or <sup>especially</sup> without pay or reward, is encouraged

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1. Huj., II, pp. 143-44; San., VIII, p. 209.

among Muslims. This was also another additional or subsidiary ruling by 'Alī b. Abī Ṭālib.<sup>1</sup> This encouragement was introduced by the Companions and was not mentioned by the Prophet

### The Successors

The legality of al-ju'āla was recognized by the Successors. The theoretical and practical aspects of al-ju'āla were developed while it was practised. Those rulings of the Successors were as follows:

### The conditions for the contract of al-ju'āla

1. Al-jā'il (the reward payer) is obliged to pay rewards, after al-maj'ūl lah (the worker) has carried out the job of finding the lost property. In this case, Shurayh<sup>2</sup> and al-Sha'bī<sup>3</sup> decided that for any lost property found in a town the reward is ten dirhams and for anything found ~~outside of a town, forty~~ dirhams. 'Umar b. 'Abd al-'Azīz decided that if the worker could find it in a day he would be rewarded with a dīnar, in two days with two dīnārs, three days with three dīnārs and if it was longer than three days he would be rewarded with four dīnārs.<sup>4</sup> Ibrāhīm al-Nakha'ī,

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1. San., VIII, p. 209; Haz. M., VIII, p. 209.

2. San., VIII, p. 208; Haz. M., VIII, p. 208.

3. Haz. M., VIII, p. 208.

4. San., VIII, p. 208; Haz. M., VIII, p. 209.

however, fixed the reward of forty dirhams only.<sup>1</sup> This shows the reward may be given to the worker in accordance with the distance and time of finding the property.

ii. According to al-Sha'bī, the worker was not liable to replace or compensate any property or animal which was lost while in his hands, after he had found it earlier.<sup>2</sup>

iii. Regarding the maintenance of a runaway animal or lost property, al-Sha'bī was of the opinion that if the finder finds and maintains or looks after an animal which has run away to find pasture (kalā') and water, he is not entitled to any compensation. But if it has run away to escape anything out of fear, he has the right to compensation or reward from the owner.<sup>3</sup> But 'Umar b. 'Abd al-'Azīz decided that the finder is, in any case, entitled to claim the provender or maintenance.<sup>4</sup>

iv. Qatāda was of the view that if anyone abandons an animal and it is found by another person who gives a new life to the animal, then the latter is regarded as its new owner.<sup>5</sup>

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1. Haz. M., VIII, p. 209.

2. San., VIII, p. 209.

3. Ibid., p. 210.

4. Ibid.

5. Ibid.



v. Shurayḥ was of the opinion that the man is not allowed to buy lost property which he has not found, if he knows its whereabouts.<sup>1</sup> But al-Sha'bī added that the worker (al-maj'ūl lah) is not permitted to buy lost property which he has not yet found. He considered such a sale as a gharar transaction.<sup>2</sup>

vi. Ibrāhīm al-Nakha'ī was of the opinion that the return of lost property by the finder to its owner, with or especially without asking any reward, is encouraged among Muslims.<sup>3</sup> This illustrates that some of the Successors followed and extended the ruling of the Companions on this subject, but the others did not encourage such practice without any compensation. In the latter case, al-Qāsim b. Muḥammad b. Abī Bakr urged the finder to return any lost property to the place where he had found it should he not be compensated by the owner for the finding.<sup>4</sup>

### Conclusion

Al-ijāra is a contract of proposed and known usufruct with a specified and lawful return for the expended effort, while al-ju'āla is a contract for the beneficial use which is assumed for its achievement. The latter

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1. San., VIII, pp. 210-11.

2. Ibid., p. 211.

3. Haz. M., VIII, p. 209.

4. Ibid., pp. 209-10.

contract has some elements of uncertainty or gharar in it, but it was legalized by basing such legality on recognition of the principle of necessity (ḍarūra). These twin contracts have some similarities in their theory and practice.

Al-ijāra consists of usufruction of property and employment or service. The paramount important elements of validity of this contract are the consent of both parties to the contract, the absolute knowledge of the contracted usufruct, the guaranty of delivery of hired goods and execution of works completely, the usufruct must be lawful, the rate of the contract, the property and the value of the usufruct must be known and the rent or salary must be just and reasonable. Only death and emigration will dissolve the contract. To ensure justice to both parties in the contract, ~~as~~ in other commercial contracts, in al-ijāra, any liability on either party is imposed when transgression occurs. These essential aspects make al-ijāra differ substantially from al-ju'āla.

In al-ju'āla, in spite of its risky nature, Islamic law legalizes it because of its necessity. The only aspects of certainty which exist in this contract are the amount of reward offered for and a specified service to be carried out. On the other hand, in al-ijāra, the nature of usufruct must be definitely specified, the value of consideration and the period of hiring must be precisely fixed and exactly determined respectively.

These two pre-Islamic legal contracts evolved their theoretical and practical applications fundamentally during the times of the Prophet, the Companions and the Successors.



CHAPTER IX

JURIDICAL SETTLEMENT OF DISPUTES,

AL-ṢULḤ (AMICABLE SETTLEMENT)

AND EXTINCTION OF AN OBLIGATION

This chapter deals with the investigation of the formation and development of legal theory and practice of solving disputes between the parties in a contract, al-ṣulḥ (amicable settlement) and al-ḥawāla (transference of debts from one person to another; assignment of debts). The analysis of these subjects are as follows:

I. Juridical settlement of disputes between vendor and purchaser

The legal injunctions of the Qur'ān, the rulings of the Prophet, the Companions and the Successors on legal settlement of commercial disputes.

II. Al-ṣulḥ (Amicable settlement, composition, Transaction)

The definition of al-ṣulḥ, al-ṣulḥ in pre-Islamic times, the legality of al-ṣulḥ in the Qur'ān and by the Prophet, and the conditions for the validity of al-ṣulḥ in the Qur'ān and by the Prophet.

The Companions and the Successors with <sup>their practices of</sup> al-ṣulḥ and their legal rulings.

### III. Extinction of an obligation

Two ways of extinguishing obligations:

- a. Al-ḥawāla (Transference of debts from one person to another; assignment of debts)

The definition of al-ḥawāla, its origin and al-ḥawāla and the contract of loan in pre-Islamic times.

The legality of al-ḥawāla. Al-ḥawāla and its legal decisions by the Prophet, the Companions and the Successors.

- b. Bay' bi al-suftaja (Sale by bill of exchange)

The relationship of al-ḥawāla and al-suftaja. Al-suftaja in pre-Islamic times. The legal decisions of the Prophet, the rulings of the Companions and the Successors on al-suftaja.

I. Juridical settlement of disputes between vendor and purchaser

According to al-Nawawī,

"Where the two contracting parties have agreed upon the validity of a sale, but not upon its details, as e.g. the amount or the nature of the price, the stipulation of a time within which payment should be made, or the quantity of goods sold; and if neither party is able to prove his case, they should both take an oath as to the falsehood of what is alleged by the adverse party, and the truth of their own statements. The vendor is the first to be sworn.... A single oath combining a denial and an affirmation, mortis causa, is sufficient on the part of each, but the denial must always be pronounced first. Thus one should say, 'I did not sell for this sum, but I sold for that.'

When the oath has been taken by both parties, the contract is not considered as being immediately dissolved. The court (or the authorities) should first endeavour to persuade the parties to a reconciliation. If this is unsuccessful, then each of the parties has a right to cancel the contract, or if necessary, the court (or the authorities) decrees its dissolution.... Upon cancellation, however, it is effected, the purchaser must return the thing bought, or its value, if he has already disposed of it either by conversion into immovable property or by enfranchisement or by sale,



just as if it had been accidentally destroyed. The value of an article is that which it had on the day it was lost. In case of accidental deterioration, but not total loss, the purchaser must all the same return the article to the vendor, and indemnify him for the loss in its value."<sup>1</sup>

The origin of the above case is taken from the Traditions as follows:

- i. "Whenever the two parties, in a sale,<sup>are</sup> in dispute, and they have no evidence and the goods exist, it will be decided in accordance with the statement of the vendor or they should make an agreement between themselves."<sup>2</sup>
- ii. "The defendant, in this case is the vendor, is the first to take an oath, if there is no evidence."<sup>3</sup>
- iii. "Any sale which is disputable, will be decided in accordance with the statement of the vendor, or the owner of the property, or they should make an

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1. Naw., pp. 144-45; cf. Muw Y., pp. 560-61; cf. Asl., pt. I, vol. I, pp. 105-15 (1-19); cf. M. in Um., VIII, p. 185; Mab., XIII, pp. 28 et seq; sab., III, pp. 102-04.
2. Han. M., p. 221 (495); J. Ma., II, p. 32; cf. Tay., II, p. 53; and Dau., III, pp. 386-87.
3. San., VIII, p. 271.

agreement between themselves."<sup>1</sup>

iv. "Whenever the parties in a sale are in dispute, the statement of the vendor will be accepted and the purchaser has the right of option."<sup>2</sup>

v. In a case where two men were in dispute about an animal and they gave their respective evidence showing that they had been rearing it, the Prophet decided that the animal belonged to the claimant with whom the animal was presently staying.<sup>3</sup>

According to al-Shaybānī, Abū Ḥanīfa and he both hold the view that if two parties disagree on the price, they have to take an oath and return the price and commodity to one another.<sup>4</sup> The parties must take an oath and dissolve the contract and make an agreement between themselves without any liability on the part of each party, even though after the commodity has been consumed by the purchaser.<sup>5</sup>

#### The Companions

The Prophet had laid down the grounds for settling disputes between two parties in any business transaction.

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1. Han. M., pp. 220-21 (495-96); Ath., p. 182 (830); San., VIII, pp. 271-72; Muw. Sh., p. 278; Muw. Y., p. 559.

2. M. in Um., VIII, p. 184.

3. Han. M., p. 222 (497 and 498); Ath., p. 160 (734).

4. Muw. Sh., p. 278.

5. Ibid.

Those regulations are as follows:

- i. Primarily, the defendant is given the right of taking an oath, if no indisputable evidence or proof is available.
- ii. If there is a dispute between two parties (in a transaction), and they have no evidence, it will be decided in accordance with the statement of the vendor (he is usually the defendant) (on oath) or they should make an agreement between themselves.

On the basis of the above regulations, the Companions gave their judgement in any dispute between two parties in a business transaction. Firstly, 'Abd al-Rahman b. Abi Layla said: "I was with Abu al-Darda'. Two men brought a claim about a horse to Abu al-Darda'. Each claimant substantiated his claim with respective evidence to show that the horse belonged to him. Each of them claimed that he was rearing it, and that he had not transacted it to anyone, nor had he given it to anybody. Abu al-Darda' said: 'Clearly one of you is a liar.' He divided it (i.e. the price) between the two parties into equal parts. He continued, 'Neither of you needs an iron chain like the iron chain of the sons of Israil, which was sent down and put on the neck of the transgressor.'<sup>1</sup> In this decision, Abu al-Darda' settled the dispute in an amicable way, by dividing the goods

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1. San., VIII, pp. 276-77.



between the two parties when both of them could produce their respective evidence in support of the claim, before the situation could become aggravated. This shows that the public authorities had power to settle disputes in accordance with their will, to stop any disagreement.

In another report, 'Alī b. Abī Ṭālib said that two men had come to him, with a dispute over a mule. One of the claimants had brought five witnesses supporting his claim that he had been rearing the mule. The other claimant had brought two witnesses testifying that he had been rearing the mule. 'Alī asked those claimants and their witnesses what their opinion was. He asked whether he should judge (decide) in favour of the claimant who had more witnesses. He asked whether two witnesses might not be better than the five. 'Alī said: "In this case there are two possible settlements, i.e. a judgment (qaḍā') and an amicable settlement or reconciliation (ṣulḥ). I will explain to you what is meant by judgement and reconciliation. If an amicable settlement is agreed (on the price of) the goods should be divided between the two parties, so that the one who has five witnesses is given five shares or portions and ~~to~~ the one who has two witnesses is given two shares. If there is to be a judgment then one of the claimants has to take an oath, supported by his witnesses. He is then allowed to take back the mule. If he wishes he can support his oath with any confirmed

and ratified statement or other strong evidence (taghlīz al-yamīn), then he is allowed to take back the mule."<sup>1</sup>

This report indicates that the decision in the case of such a dispute may be settled in two ways. It may be done by reconciliation with the division of the shares, in accordance with the number of witnesses who have been produced by the parties. If the decision is made by judgment, the parties will be requested to take an oath, accompanied by the testimony of their respective witnesses and supported by other statements. In this case, the claimed goods will be given to the one who has taken the oath. Further, in cases where the number of witnesses was equal, the goods would be divided equally between the two parties in the dispute. This was held by 'Abd Allāh b. al-Zubayr.<sup>2</sup>

According to al-Ṣan'ānī, Yaḥyā b. al-Jazzār reported that two men had put forward their claims to 'Alī b. Abī Ṭālib about a riding animal which had been in the possession of one of them. Each of them presented his respective evidence showing that the animal had belonged to him. 'Alī decided that the animal was owned by the claimant with whom the animal was presently staying. 'Alī said: "If the animal had not been in the hands of either of them, and each of them established his respective evidence proving that the animal belonged

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1. San., VIII, p. 278.

2. Ibid., p. 280.

to him, then (the price of) the animal would have had to be divided between them."<sup>1</sup> This decision by 'Alī b. Abī Tālib shows that if there is any dispute between a vendor and a purchaser and the goods have been possessed by one of them and possibly already usufructed, then the public authorities should decide that these goods be given to the one who has possessed them.

The above four decisions made by the Companions demonstrated that they made further elaborations and rulings in these cases of dispute in business transactions. Their rulings were based on the law which had been laid down by the Prophet.

#### The Successors

The Successors built on the foundations already laid down by the Prophet and the Companions for settling any dispute between vendor and purchaser. They made their rulings accordingly as follows:

i. If in a transaction both parties swore to support their respective claims to the goods or if both refused to take the oath, the goods would then be divided between them. If, however, either one of them refused to take the oath, the goods would be given to the one who took the oath. This was held by Muḥammad b. Sīrīn<sup>2</sup> and

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1. San., VIII, p. 278.

2. Ibid., p. 272.



Shurayh.<sup>1</sup> According to Shurayh, if the claimants or plaintiffs were relying on witnesses, they should bring at least two. In such cases, the oath was to be taken by the party denying the claim.<sup>2</sup> According to him, if both parties took the oath or they denied the contract, they should make agreement between themselves.<sup>3</sup> To support such a decision, 'Amr b. Dīnār opined that the testimony with oath and witnesses is accepted or valid in the case of property.<sup>4</sup>

ii. If both parties claimed the destroyed goods, the claims of the purchaser had to be accepted, but such a claim must be affirmed with an oath if there was no evidence, unless the seller brought evidence to support his claim. This was held by Ibrāhīm al-Nakha'ī, Hammād b. Abī Sulaymān and Abū Yūsuf.<sup>5</sup> If the evidence of both parties was substantiated, according to Ibrāhīm al-Nakha'ī, he would accept the evidence of the party who argued for amicable settlement.<sup>6</sup> However, according to al-Sha'bī the defendant was not required to produce any evidence for

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1. Haz. M., VIII, p. 368.

2. San., VIII, p. 272.

3. Mud., IV, p. 189.

4. Ah. M., IV, pp. 349-50 (2970).

5. Haz. M., VIII, p. 368.

6. San., VIII, pp. 272-73.

his case.<sup>1</sup> According to al-Thawrī, if two goods were bought from two sellers by mutual consent, in the case of a claim involving any one of the two goods the parties were required to take oath before the dispute could be settled, particularly in cases where the purchaser did not know which one of the two goods belonged to each of the two sellers.<sup>2</sup> However, if one of the two goods was found to be defective, the claim of the seller would be accepted, provided the claim was coupled with evidence. If, however, the seller could not produce evidence while the purchaser could, then the evidence of the latter was to be accepted.<sup>3</sup> According to al-Thawrī, if the seller claimed that he was a minor when he sold the goods, his claim would be accepted, provided he could produce evidence. The transaction was considered valid, even if the seller was a minor, unless the goods were destroyed.<sup>4</sup> However, if the purchaser wanted to return the goods, but the vendor claimed the goods were not his then the purchaser's claim would be accepted.<sup>5</sup>

iii. In the case of a dispute where the goods, especially

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1. San., VIII, p. 273.

2. Ibid., p. 274.

3. Ibid.

4. Ibid., p. 275.

5. Ibid.

animals, were in the hands of one of the parties, the Successors ruled that the goods should be given to the party in whose possession the goods had been. This was held by Ṭāwūs, Muḥammad b. Sīrīn and Shurayḥ. In the case of animals, Shurayḥ supported his argument by saying that the breeder (al-nātiḥ, i.e. he who was looking after them) had more right than the one who knew about (al-ʿārif) the animal.<sup>1</sup>

iv. According to al-Thawrī, if both parties could produce the same evidence, the evidence of the claimant would be accepted.<sup>2</sup>

v. According to Qatāda if the goods were in the possession of both parties, then they would be divided between them equally, whether they denied each other's claims or took the oath.<sup>3</sup> According to al-Thawrī, such equal division had to be made, in cases where either of the claimants claimed half or whole of the goods.<sup>4</sup>

## II. Al-ṣulḥ (Amicable settlement or composition, Transactio)

### The definition of al-ṣulḥ

Literally, al-ṣulḥ means reconciliation, dis-

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1. San., VIII, pp. 277-78.

2. Ibid.

3. Ibid., p. 281.

4. Ibid.



continuation or stoppage of dispute or dissension and contention.<sup>1</sup> Legally, al-ṣulḥ is a contract to terminate or to avert a dispute or lawsuit between two litigants.<sup>2</sup> Each of the two contracting parties (al-muta'āqidān) is a peacemaker or conciliator (muṣāliḥ). The litigated right or case at issue is the conciliable right (muṣālah 'anh), i.e. cases of ḥuqūq al-'ibād or ḥuqūq Adamī (private claims), and the consideration for settlement which is called muṣālah 'alayh or badal al-ṣulḥ.<sup>3</sup> Al-ṣulḥ may be compared with the Roman-Byzantine transactio.<sup>4</sup>

The contract of al-ṣulḥ (amicable settlement) is not only procedural, although its purpose is the elimination of dispute; it is also possible as an agreement of the parties to modify an existing obligation by which the creditor, for a consideration, waives his original claim. This contract is not restricted to the law of business transactions, claims arising from family law and penal law, apart from ḥadd or fixed punishments, may also be settled by al-ṣulḥ.<sup>5</sup>

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1. Cf. Lan., II, p. 1715.

2. Tahanawi, IV, p. 215.

3. Kas., VI, pp. 40-48; Intro., p. 148; Sab., III, p. 375.

4. W. Heffening, EI<sup>I</sup>, vol. IV, p. 541.

5. Intro., p. 148.

According to al-Shāfi'ī, al-ṣulḥ was of the same status as sales (and contracts), in its application for any permissible acts or otherwise. Al-ṣulḥ also could be made in the case of retaliation, lex talionis, family law and inheritance.<sup>1</sup>

#### Al-ṣulḥ in pre-Islamic times

Al-ṣulḥ was the common practice in pre-Islamic times to end any dispute or war between two parties or groups. There were several reports on this matter. Some of them were as follows:

i. When the people in Mecca had thus decided on war, suddenly some of them demanded peace (al-ṣulḥ), on the condition that Banū 'Abd Manāf should be given the rights of watering the pilgrims and collecting tax; and that access to the Ka'ba, the standard of war, and the assembly house, should belong to 'Abd al-Dār as before. The arrangement commended itself to both sides and was carried out, and so war was prevented. This was the state of affairs before the advent of Islam. Then the Prophet was reported to have said:

"Whatever alliance there was in the days of ignorance Islam strengthens it."<sup>2</sup>

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1. Um., III, p. 226.

2. IH., I, p. 122.

ii. The Prophet, before his prophethood, was appointed to settle the dispute of who would lift the black stone (al-ḥajar al-aswad) to its place, when the Quraysh rebuilt the Ka'ba. The Prophet, in this event, put the black stone inside a cloak and asked each tribe to take hold of an end of it and lift it together, and then he placed it, to its place, with his own hand.<sup>1</sup> The Quraysh were satisfied with the settlement.

iii. According to Mujāhid and Sa'īd b. Jubayr, al-Aws and al-Khazraj had been the two warring tribes in Medina. They had been in constant war before the Prophet emigrated to Medina and they ended their enmity afterwards, especially after the verse:

"If two parties among the believers  
fall into a quarrel, make ye peace  
between them,"<sup>2</sup>

was revealed to the Prophet.<sup>3</sup>

#### The legality of al-ṣulḥ

The legality of al-ṣulḥ was endorsed in the Qur'ān and by the Prophet as follows:

i. In the Qur'ān:

"If two parties among the believers  
fall into a quarrel, make ye peace

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1. IH., I, p. 182.

2. Q., 49:9.

3. Jam., XVI, pp. 315-16.



between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until he complies with the command of God; but if he complies, then make peace between them with justice, and be fair: for God loves those who are fair (and just)."<sup>1</sup>

ii. In the Qur'ān:

"If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best."<sup>2</sup>

iii. The Prophet was reported to have arranged an amicable settlement, between Ṣafwān b. Mu'aṭṭal and Ḥassān b. Thābit, over the composition of defamatory or satirical poems by Ḥassān on Ṣafwān. The latter had hit or beaten the former's hand. The settlement was made after the former's and the latter's acknowledgement of the poems and act respectively.<sup>3</sup>

iv. The Prophet is reported to have said:

"An amicable settlement (al-ṣulḥ) is permissible between Muslims."<sup>4</sup>

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1. Q., 49:9.

2. Ibid., 4:128.

3. J. Ma., II, p. 59.

4. Mud., IV, pp. 364 and 365.

The conditions for the validity of al-ṣulḥ

i. The property in al-ṣulḥ should be a known quantity or degree.<sup>1</sup> It was mentioned in the Qur'ān:

. "Eat not up your property among yourselves in vanities, but let there be amongst you trade by mutual good will."<sup>2</sup>

This verse shows that trade should be conducted in a spirit of mutual good will. This mutual good will cannot materialize unless the parties know the quantity of the goods. Such a precedent is relevant in the case of al-ṣulḥ.

ii. Al-ṣulḥ is valid with acknowledgement and evidence for the specified obligatory properties in al-khul' (the dissolution of marriage by which the wife redeems herself from the marriage for a consideration) or in other cases of family law.<sup>3</sup> The Qur'ān refers specifically to this.<sup>4</sup> Al-ṣulḥ is also valid with such acknowledgement and evidence in the case of retaliation (qiṣāṣ or qawad), lex talionis.<sup>5</sup> To justify such cases of al-ṣulḥ, the Prophet is reported to have said:

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1. Haz. M., VIII, p. 165.

2. Q., 4:29.

3. Haz. M., VIII, p. 166; Intro., p. 148.

4. Q., 4:128.

5. Haz. M., VIII, pp. 166-68; Intro., pp. 148 and 181.

"Your blood and your property are  
sacrosant."<sup>1</sup>

All such cases are considered to be ḥuqūq al-ʿibād or ḥuqūq Ādamī (private claims) as opposed to ḥuqūq Allāh (rights or claims of God).<sup>2</sup> Al-ṣulḥ is not applicable in all cases of ḥuqūq Allāh (rights or claims of God), therefore it does not apply in all cases of rights or claims of God, such as ḥudūd or fixed punishments, because God, in such cases, has authority to make a judgment.<sup>3</sup> Further, if a witness arranges settlement or makes a compromise with property to conceal his testimony against an offender ~~of~~ ḥuqūq Allāh or ḥuqūq al-ʿibād or ḥuqūq Ādamī, such settlement is not lawful because of the illegality of the concealment of testimony and the establishment or performance of testimony is considered as ḥuqūq Allāh.<sup>4</sup> On this matter, it was mentioned in the Qur'ān:

"Conceal not evidence; for whoever  
conceals it, his heart is tainted  
with sin."<sup>5</sup>

And it was also mentioned in the Qur'ān:

"And establish the evidence (as)  
before God."<sup>6</sup>

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1. IH., IV, p. 185.

2. Kas., VI, p. 48; cf. Intro., p. 176; Sab., III, p.381.

3. Kas., VI, p. 48; Intro., p. 176.

4. Kas., VI, p. 48.

5. Q., 2:283.

6. Ibid., 65:2.



### The Companions

The Companions continued the practice of al-ṣulḥ and they recognized its legality, as the Prophet had directed. 'Umar b. al-Khaṭṭāb instructed Abū Mūsā al-Ash'arī, saying:

"And an amicable settlement (al-ṣulḥ) is permitted or lawful between Muslims (in dispute), except in the case of an amicable settlement which forbids a permissible one (ḥalāl) and permits a prohibited one (ḥarām)."<sup>1</sup>

'Umar b. al-Khaṭṭāb was also of the opinion that disputes should be avoided and an amicable settlement ought to be brought about (by the authority), because the unmistakable or decisive judgment would give rise to rancours or malevolences (al-ḍaghā'in) among the people.<sup>2</sup>

### The conditions for the validity of al-ṣulḥ

1. Neither was there any comment by the Companions on al-ṣulḥ which should be a known quantity or degree. This may indicate that they agreed on this principle. Nor was there any disagreement on the validity of al-ṣulḥ with acknowledgement and evidence for the specified obligatory properties in al-khul', or in other cases of family law.

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1. Cf. Huj., II, p. 595; Um., III, p. 226; Haz. M., VIII, p. 162.

2. San., VIII, p. 304.

However, al-ṣulḥ is valid with such acknowledgement and evidence in the case of retaliation (al-qisās). 'Abd Allāh b. 'Abbās interpreted the verse relating to lex talionis:

"But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude."<sup>1</sup>

He stated that the verse showed the permissibility of al-ṣulḥ in a retaliation, lex talionis, whether in a lesser, greater or more grievous case.<sup>2</sup> This indicates that al-ṣulḥ was also applied in the case of retaliation (al-qisās) by the Companions, being considered to be ḥuqūq al-'ibād or ḥuqūq Ādamī (private claims).

### The Successors

The Successors also recognized the permissibility of al-ṣulḥ, by giving extended rulings on the conditions for the validity of it. Those rulings were as follows:

i. Shurayḥ was of the opinion that, besides the two witnesses who have been produced by the claimant, an amicable settlement is not permitted, except when the claimant who has the right for such a claim in a disputable case, is sufficiently powerful and able to take his right

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1. Q., 2:178.

2. Kas., VI, p. 49; Jam., I, p. 235.

by any means, if such right is given to him by his opponent, viz. the defendant. In addition to the witnesses, the claimant also has to produce evidence substantiating his claim.<sup>1</sup>

Regarding the property in al-ṣulḥ, this should be of a known quantity, al-ṣulḥ is valid with acknowledgement and evidence for the specified obligatory property in al-khul' and in other cases of family law, no comment was made by the Successors. They did not comment on al-ṣulḥ in the case of rights or claims of God (ḥuqūq Allāh) either. But on private claims (ḥuqūq al-'ibād or ḥuqūq Ādamī), Sulaymān b. Yasār considered that the beneficiaries were liable to pay blood-wit (diya), in the case of intentional homicide.<sup>2</sup>

In general, the authorities are not permitted to make any amicable settlement (al-ṣulḥ) in disputes, if elucidated or evident judgment could be found. This opinion was held by 'Aṭā' b. Abī Rabāḥ, Ma'mar b. Rāshid and Ibn Abī Laylā.<sup>3</sup>

They did not make any further comment on other than the above rulings. This may indicate that they followed the instructions of the Prophet and the rulings of the Companions, without any further legal decisions, in other than the above rulings.

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1. Haz. M., VIII, p. 161.

2. Mud., IV, p. 371.

3. San., VIII, p. 304.



### III. Extinction of an obligation

#### Two ways of extinguishing obligations:

- a. Al-ḥawāla (Transference of debts from one person to another; assignment of debts)

#### The definition of al-ḥawāla

Al-ḥawāla is a way of extinguishing an obligation by transforming it into a new one. Al-ḥawāla, literally, implies 'transfer'.<sup>1</sup> Legally, al-ḥawāla is an agreement by which a debtor is freed from a debt by another becoming responsible for it,<sup>2</sup> or the transfer of a claim, of a debt, by shifting the responsibility from one person to another.<sup>3</sup> This applies to a mandate to pay.<sup>4</sup> Al-ḥawāla, later, appears to denote the document by which the transference of the debt is completed and next receives the meaning of cheque, or order to pay, to a public exchequer.<sup>5</sup> In the institution of al-ḥawāla, one of the practical advantages is that it enables a debtor to make payments in another place through his agent or a second person. Its effect is the same as that of the bill of exchange (al-suftaja).<sup>6</sup> Further, historically,

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1. Intro., p. 148.

2. Cf. Haz. M., VIII, p. 108; cf. Lis., XI, p. 190.

3. Lan., I, p. 677.

4. Intro., p. 148.

5. Ch. Huart, EI<sup>1</sup>, vol. II, p. 292.

6. Intro., p. 149.

the source of the bill of exchange originated from al-hawāla and al-suftaja.<sup>1</sup> Later, these rudimentary judicial limits set for al-hawāla by Islamic law were developed. The French term aval, was originally from the Arabic al-hawāla.<sup>2</sup> This contract was sanctioned by the Muslim jurists and it was carried to Europe through Spain and Sicily during the crusades of the twelfth century of the Christian era.<sup>3</sup>

#### The origin of al-hawāla

Al-hawāla derives from the word "al-tahawwul"<sup>4</sup> or "al-tahwīl",<sup>5</sup> which means transfer or change of locality<sup>6</sup> from a person to another or from a situation to another or "al-tanaqqul".<sup>7</sup> In this respect, it is mentioned in

1. Intro., p. 149.
2. D. Huvelin, Annales de Droit commercial (Paris, 1901), pp. 22-26; Subhi Mahmasani, Transaction in the Shari'a, in Law in the Middle East, Origin and Development of Islamic Law, ed. Majid Khadduri and Herbert J. Liebesny, vol. I (Washington, 1955), p. 202.
3. Subhi Mahmasani, op. cit., p. 202.
4. T.J., XVI, p. 38; Zur., III, p. 325.
5. T.J., XV, pp. 103, 133-34; Jam., X, pp. 279 and XI, p. 68; A'lam, I, p. 439.
6. Cf. Zur., III, p. 325.
7. Jam., XI, p. 68.

the Qur'ān:

"No change will they wish for ~~from~~ them."<sup>1</sup>

This may imply that the debts are transferred or changed from being the obligation or responsibility of the transferrer or assignor (al-muḥīl) to being the obligation of the transferee or delegated payer (al-muḥāl 'alayh).<sup>2</sup> It is an agreement whereby a debtor is released from a debt by another becoming responsible for it.<sup>3</sup>

In this case, al-ḥawāla consists of three important participants, i.e. al-muḥīl (the debtor) al-muḥāl (the creditor) and al-muḥāl 'alayh (the delegated payer).<sup>4</sup>

#### Al-ḥawāla and the contract of loan in pre-Islamic times

The contract of al-ḥawāla in a contract of loan was not known in pre-Islamic times, apart from the contract of bay' bi al-suftaja (sale by bill of exchange).<sup>5</sup> Further, transfer of debt was not permissible in Roman law.<sup>6</sup> Therefore, this institution was originally Islamic.

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1. "لا يبغيون عنها حولا" Q., 18:108.

2. Cf. Haz. M., VIII, p. 108; Sab., III, p. 211.

3. Cf. Lan., I, p. 675.

4. Kas., VI, pp. 15-16; Sab., III, p. 211.

5. Cf. Muf., VII, pp. 404-05, 411-12 and 435-37.

6. Subhi Mahmasani, op. cit., p. 202.



The legality of al-ḥawāla

The evidence of ḥawāla's legality originated from the two Traditions of the Prophet. They are as follows:

i. The Prophet said:

"Procrastination in paying debts by a wealthy man is injustice. So, if your debt is transferred from your debtor to a trustworthy rich debtor (malī'), you should agree."<sup>1</sup>

ii. Jābir b. 'Abd Allāh said that the Prophet had paid him his debt and he had provided him (with some extra provisions).<sup>2</sup>

The first Tradition indicates that the order of the Prophet to accept al-ḥawāla by a rich debtor is an order of recommendation, as was held by the majority of the jurists.<sup>3</sup> This contract is considered as a worldly beneficial matter or requirement and good interest and it is, therefore, regarded as the performance of a good deed (al-iḥsān) to the debtor, by fulfilling his intention through transferring an obligation from him and releasing him from his legal encumbrance with loans, while the performance of a good deed is a recommendable act (mustaḥabb).<sup>4</sup> This Tradition also implies that

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1. Muw. Y., p. 562; Um., III, p. 233; San., VIII, pp. 316-17.

2. San., VIII, p. 318.

3. Zur., III, p. 325.

4. Ibid.

al-ḥawāla may be made for deferred debts or for debts the payment of which is fixed in time which are to be paid immediately or without delay, but not for debts to be paid at a fixed time in the future.<sup>1</sup> Further, this Tradition shows that al-ḥawāla is valid when it is contracted as a result of mutual consent between al-muḥāl (the creditor) and al-muḥāl 'alayh (the delegated payer).<sup>2</sup> The second Tradition shows that al-ḥawāla is a voluntary and commendable act.

#### The Companions

The legality of al-ḥawāla was recognized by the Companions and they continued to practise it and give extended legal rulings on it.

In the case of bankruptcy or death of the transferee or delegated payer (al-muḥāl 'alayh), 'Alī b. Abī Ṭālib ruled that the obligation to pay the debt, would return to the transferrer or assignor (al-muḥāl).<sup>3</sup> In the case of payment in kind, if the property for the payment of such debt was damaged and the transferee (al-muḥāl 'alayh) was not able to replace it, he was also allowed to return the obligation to pay the debt to the transferrer (al-muḥāl). This was also the practice of 'Alī b. Abī Ṭālib.<sup>4</sup> Further,

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1. Haz. M., VIII, p. 110.

2. Kas., VI, p. 16; Sab., III, p. 212.

3. San., VIII, p. 271.

4. Haz. M., VIII, pp. 109-10.

in relation to hawāla contract, 'Uthmān b. 'Affān was of the opinion that no property of a Muslim was to be lost or allowed to perish.<sup>1</sup> It may be suggested that the implication of his opinion is that no obligation of debt on the part of a Muslim will be left without being paid, when the transferee (al-muḥāl 'alayh) goes bankrupt, dies and so on. Therefore, in such cases, the obligation will be returned to the transferrer.

### The Successors

The Successors accepted the legality of al-ḥawāla and they developed the practical aspect of al-ḥawāla, by giving further rulings to extend its practicability.

Their rulings were as follows:

i. Al-Ḥasan al-Baṣrī, Ibrāhīm al-Nakha'ī, Shurayḥ<sup>2</sup> and al-Sha'bī<sup>3</sup> were of the opinion that if the transferee or delegated payer (al-muḥāl 'alayh) did not pay the debt, the responsibility of such payment returns to the transferrer or assignor (al-muḥāl). According to al-Ḥasan al-Baṣrī and Ibrāhīm al-Nakha'ī, the property of a Muslim

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1. Haz. M., VIII, p. 109. Al-Shāfi'ī was of the opinion that the obligation could not be transferred back to the transferrer in whatever circumstances, unless a new contract was made. Al-Shaybānī was against this opinion. The latter based his argument on 'Uthmān's view. See Um., III, p. 233.

2. San., VIII, pp. 269-70.

3. Haz. M., VIII, p. 109.



does not perish or become damaged,<sup>1</sup> without any reimbursement or restitution.

b. Al-suftaja (Bill of exchange)

One of the practical purposes of this institution is that it enables a purchaser to make payments in another place through a second party. This can be construed only as a loan of money; the transaction is reprehensible, because it is a loan of money from which the purchaser derives, without giving a counter value, the advantage of avoiding the risk of transport, but it is not invalid. In practice, the purchaser buys from the second party a draft on the place in question. Historically, the origin of the bill of exchange can be traced to al-suftaja (plural al-safātij) and al-ḥawāla (transference of debts from one person to another; assignment of debts).<sup>2</sup> Al-ḥawāla and al-suftaja have a similar purpose with dissimilar regulations and procedures. Al-suftaja is deemed to be another way of extinguishing an obligation.<sup>3</sup>

Al-suftaja in pre-Islamic times

This institution had been recognized by Arabs in pre-Islamic times, to secure their goods from any danger on the road, by authorizing a trustworthy agent to deliver any property to anyone who needed it in the latter's place

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1. San., VIII, pp. 270-71.

2. Cf. Taj., II, p. 59; Intro., p. 149.

3. Cf. Intro., p. 149.

or country, at a specified time, with a specified profit and interest or as a loan without profit or interest.<sup>1</sup>

### The Prophet and al-suftaja

The first precedent on al-suftaja contract was set by the Prophet. It was reported that he had used to give some fruit to the wife of 'Abd Allāh b. Mas'ūd, i.e. Zaynab, from Khaybar and 'Āṣim b. 'Iddī delivered them, on behalf of the Prophet, in Medina.<sup>2</sup> It appears that this report was the first contract of al-suftaja in Islam.

### The Companions

'Umar b. al-Khaṭṭāb disapproved of such a contract, except if the contract was guaranteed by a suretyship.<sup>3</sup> In addition, 'Abd Allāh b. 'Abbās allowed such a contract,<sup>4</sup> as long as no <sup>unjust</sup> precondition was stipulated in it.<sup>5</sup> 'Abd Allāh b. Zubayr used to buy properties from merchants on credit, in another place, and his governors wrote bills of exchange to pay them.<sup>6</sup> Such contracts were made

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1. Muf., VII, pp. 411-12.

2. San., VIII, pp. 140-41.

3. Ibid., p. 141.

4. Ibid., p. 140.

5. Huj., II, p. 610.

6. San., VIII, p. 140. According to al-Shaybānī, 'Abd Allāh b. al-Zubayr used to take few dirhams from the merchants in Mecca, then he wrote a letter (i.e. a bill of exchange) to Mus'ab b. al-Zubayr (in Irāq) to reimburse for them. See Huj., II, p. 610.

without prior unjust conditions.

### The Successors

As has already been mentioned, the main practical purposes of this institution was to enable a purchaser to make payments in another place through a second party. By doing so, both parties had the advantage of avoiding the risk of transport. Among the Successors, who were in favour of such practice, was Muḥammad b. Sīrīn. He emphasized that when a contract for the delivery of goods in another place was agreed upon, and where the purchaser paid them in advance, such transactions should not be made with any <sup>unjust</sup> precondition for such delivery. However, there was no harm if the preconditions were made in accordance with a universally acceptable procedure.<sup>1</sup> Another Successor, Ibrāhīm al-Nakha'ī, prohibited the contract of al-suftaja.<sup>2</sup> It may be assumed that he thought that the practice of sale by bill of exchange was not yet universally acceptable or widely practised during his time, therefore such a contract should not be allowed, or he did not allow it if the contract was made without any guaranty or with unjust preconditions.

Ṭāwūs himself, on the other hand, used to pay traders in advance for food from his place, i.e. a place near al-Janab in Yemen. Later, they brought it to al-Janab

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1. San., VIII, p. 140.

2. Ibid.



for him. However, he paid the cost of transportation between his place and al-Janab.<sup>1</sup> This case shows that the cost of transportation should be included in the bill of exchange. According to al-Thawrī, the vendor could not charge extra money if he conveyed the goods to the wrong place.<sup>2</sup>

### Conclusion

This chapter deals with the three most relevant and prime important subjects in the whole commercial law in Islam, without which this law is not complete. They are the juridical settlement of disputes; amicable settlement; and extinction of an obligation. The subject of extinction of an obligation is included, because it forms a part of legal settlements in business transactions, which has certain relations with amicable settlement.

Relating to juridical settlement of disputes, the Prophet constructed two determining principles which became the basic regulations for settling commercial disputes. Such basic principles are:

- i. Essentially, the defendant (the vendor) is granted the right of taking an oath, if no evidence is available; and
- ii. If the parties in the contract have no evidence, the case will be decided in accordance with the statement of

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1. San., VIII, p. 141.

2. Ibid.

the vendor (the defendant) on oath or they should make a bilateral agreement to solve their dispute. With regard to al-ṣulḥ (amicable settlement), Islamic law regularizes it by ruling that the property, in this contract, should be a known quantity. In addition to commercial cases, this contract is also applied to cases of family law and retaliation, lex talionis, or in all cases of ḥuqūq al-ʿibād or ḥuqūq Ādamī (private claims). In this contract, the Successors extended their rulings by deciding that the claimant should be able to take his right by any means and any claim must be supported with evidence. In addition, the authorities are not permitted to make any amicable settlement if evident judgement could be found.

In cases of extinction of an obligation, two ways <sup>The acceptance of</sup> are considered. | Al-ḥawāla (transference of debts from one person to another) by a rich person is recommendably encouraged and this contract together with al-suftaja formed the bill of exchange in Islamic law. The first contract is an agreement by which a debtor is freed from a debt by another becoming responsible for it. While in the second contract, the purchaser buys from the second party a draft on the place in question, for the purpose of avoiding the risk of transport or this institution is to enable a purchaser to make payments in another place through a second party, to secure the goods from any danger on the road or it is regarded as a loan of money. Therefore, al-ḥawāla is the transfer of responsibility to pay debt and

al-suftaja is the payment for purchased goods in another place through a second party. Both of them are two ways of extinguishing obligations.

Generally, juridical settlement of disputes and al-ṣulḥ are concerned with solving commercial disputes at issue, but al-ḥawāla and al-suftaja are two ways of releasing obligations of debtor or purchaser. These institutions were initiated by the Prophet and developed by the Companions and the Successors. In al-ḥawāla, the Companions systemized it by extending their rulings that the transferrer is liable to be responsible to pay his debts in the case of bankruptcy and death of the transferee and the Successors added that the transferrer is also liable to pay the debt in the event of the transferee's failure to pay it. The regulations of al-suftaja were further expounded by the Companions<sup>in</sup> that such a contract was permitted depending on its guaranty by a suretyship and the Successors added that this contract also should be made with the agreement of delivery of goods in another place, the payment of goods in advance and the non-existence of preconditions, except if they were made in accordance with a universally acceptable procedure. By these preliminary foundations of the four institutions, the succeeding generations expanded their legal interpretations to their fullest purview or range in later times.



### CONCLUSION

In the course of this work we have seen that the gradual development of the law of contractual obligations or commerce and trade during the prophetic time, i.e. the twenty three years of the Prophet Muḥammad, as the formative period of Islam, is explicitly expressed within the exclusive scope of the law. In the formulation and evolution of minute descriptions of this law, the Qur'ān and the Traditions of the Prophet were regarded, in actual fact, as the two binding and established sources for the purpose of re-evaluating, validating and re-instating the existing pre-Islamic laws, whether local or foreign, or in order to introduce and promulgate new and undiscovered spheres of legal interpretation of commercial laws.

The changing circumstances of the time of the Companions called for a greater systemization of application as well as implementation and extension of the details of the law and judicial solutions to new circumstantial complexities and the expected or unexpected problematic legal issues of this particular law, in accordance with the adaptation of established local, customary and human conditions and everchanging times. In solving these complexities and complicated problems, the Companions added, extended or broadened and modified the subsidiary foundations of the law and left the legal and doctrinal principles intact. It is understood, however,

that in deriving new legal reasoning, they considered the Qur'ān and the Traditions as<sup>of</sup> a status of the coercive and authoritative sources which it is obligatory to follow.

The Successors adapted the law subtly and competently having acquired sufficient knowledge of legal science and judicial ability and experience. This enabled them to cope with what was required and demanded of them by the newly established environment. Hence, they redefined, reinterpreted and systematized the process of the theoretical and practical expansion of the commercial law. They made the law more uniform and balanced in all its derivative details which may also have created further technical complexities in the commercial law. In solving those problems which arose, they regarded the Qur'ān, the Traditions and the judicial decisions and legal rulings of the Companions as unchallengeable authoritative legal foundations, except in the case of resolving perplexing and obscure problematic legal questions. In this event, with the help of their acquired legal knowledge, they applied the doctrine of analogy, of necessity (al-darūra) or of a special dispensation or concession (al-rukḥṣa) and added some specified viable and valid conditions and rules to them, as the Prophet and the Companions had done. Therefore, the Successors, as the Companions, were the succeeding exponents of the legal injunctions of the Qur'ān and the Traditions. Their legal opinions had a decisive effect on the manner of perpetuating the law throughout the coming generations.

In examining Islamic commercial law, it is essential to comprehend the concept of al-bay' (sale), since it becomes the basic constituent of commercial law. It elucidates the fundamental groundwork of the Islamic law of contractual obligations and commerce and embraces the integral commutative or business transactions as a whole. The rudimentary elements of this substantive legal concept of sale evolved spontaneously with the overall growth of the umma (the Muslim community), which resulted from the complex process of Islamization and systemization of diverse systems of commerce and trade which had existed in or had been imported into pre-Islamic Arabia.

Commercial law is an ancillary or subservient particle of Islamic law. As has been seen, some particular aspects of this law originated in pre-Islamic times and they were endorsed by the Prophet. In particular, Islamic law shows systematic and organized regulations and procedures to avoid any definite tendency of unequitable elements, such as gharar or risk in sale, gambling and usury. In addition, some other spheres of pre-Islamic law were abolished altogether because of their injustices to both parties in a contract of business transactions. However, some other aspects of the law were introduced in order to fill the vacuum. In the course of developments, in the succeeding periods or generations, the Companions and the Successors enhanced the theories, practices or applications of the law by extending their legal rulings, whether to



endorse the legal injunctions which had been enjoined by the Prophet, and the rulings of the Companions, in the case of the Successor, or to translate them into specific applications, to meet the new ever-changing development of time and the Muslim community. Such developments have been evolving ever since.

Within the process of Islamization and systemization of this law, Islamic law did not recognize any transaction which had a proven illegitimate object or purpose. The Islamic doctrine of illegality of purpose includes the practice of prohibited, or ḥarām, transactions. Islamic law, therefore, clarifies the problematic issues which are to be avoided in commerce or business transactions in order to legalize them, besides preventing any ḥarām elements in them. Such illicit elements represent religious uncleanness and impurity, al-gharar (risk), al-qimār or al-maysir (gambling or game of hazard) and al-ribā (usury). Eventually, they may result in inequitable gain and cause al-zulm (injustice). In order to prevent the above negative elements, Islamic law creates various rules. First, the basic attributes of merchandise were categorized. Those attributes are that the merchandise must be pure substance, consist of materials which are of some use and objects of intrinsic legal value and they must be possessed. Secondly, the elements of injustice, usury and gambling cannot be eradicated, unless after the first phase or passage, to the above commercial negations, has been extirpated. This first element is al-gharar. Gharar or risky elements

may be avoided if some elements of certainty are met, such as in the case of al-salam and bay' al-'arāya. Islamic law expounds this doctrine in detail. In fact, the pre-Islamic bay' al-gharar, a sale which entails risk or hazard is prohibited. Such a sale is forbidden for the reason that it amounts to obtaining the property of others by selling inexecutable or unfulfilled goods. Gharar transactions also resulted in an agreement to agree, or in futuro, which is invalid, because of its uncertainty and delay in obligations. The Prophet formulated the standard rules to avoid al-gharar, that:

- i. The vendor must be able to deliver the commodity to the purchaser. It is prohibited to sell any undeliverable goods, res extra commercium; and
- ii. The commodity must be clearly known and its quantity must be determined to the contracting parties. Therefore, bay' al-juzāf (sale of the goods<sup>of</sup> which their quantity is not determined) is not permitted.

Twenty six pre-Islamic gharar transactions have been recorded. They are fundamentally invalid and not permissible in Islamic law, because they are against the basic principles of Islamic ethics and economics. Fundamentally, the doctrine of al-gharar is purposely introduced in order to avoid any hazard between the contracting parties, from the outset of a contract being formulated. This risk will bring about an unjust gain and loss which results in a certain

degree of gambling eventually amounting to the practice of usury and injustice.

Injustice does not only come from gharar and ribā transactions. It also arises from any transaction of certain commodities which cause grievous consequences to other people, therefore such commodities may not be transacted and are declared as communal, res omnium communes, e.g. water and others, except after certain conditions have been met. Such is the case for water like a well on private land or which the seller possesses from his own effort, without harming other people.

In the case of unsolvable issues, in order to resolve such problems, Islamic law introduced the doctrine of analogy, such as the prohibition of bay' al-muwāṣafa (sale by description) for the reason of its risky nature, the doctrine of al-ḍarūra (necessity), as in the case of al-ju'āla (pay in return for work, locatio conductio operis) and the doctrine of al-rukḥṣa (a special dispensation or concession) as in the case of agricultural sharecropping, métayage agricole. But these three judicial doctrines cannot be employed if certain conditions and specified rules are not fulfilled. Such conditions and rules are equity, justice, legal certainty and validity. The utilization of these doctrines, particularly al-ḍarūra, was first recognized by the Prophet. Later, succeeding generations, especially the Companions and the Successors, used these doctrines in order to interpret and modify irresolvable legal issues and to keep pace



with the evergrowing Muslim community and changing circumstantial, social and economic needs. A supremely important feature of the law was to ensure justice to both parties in any contract. Such assurance may be secured by removing any illegal elements or by introducing such legal doctrines and facilities as the conditions required, provided judicial principles are safeguarded and well protected from the intrusion of commercial negations.

APPENDIX

The names of the Companions, the Successors and the early jurists who are mentioned in the text:

I. The names of the Companions

1. Al-‘Abbās b. ‘Abd al-Muṭṭalib  
(Medina; d. 32 A.H.)
2. Al-‘Abbās b. Mirdās  
(d., n.d.)
3. ‘Abd Allāh b. ‘Abbās  
(Authority of Meccans; d. 68 A.H.)
4. ‘Abd Allāh b. Abī Awfā al-Aslamī  
(d., n.d.)
5. ‘Abd Allāh b. ‘Amr b. al-‘Āṣ  
(Medina, Mecca and Egypt; d. 68 or 69 A.H.)
6. ‘Abd Allāh b. Ja‘far b. Abī Ṭālib  
(d. circa 84 or 85 A.H.)
7. ‘Abd Allāh b. Mas‘ūd  
(Medina; d. 32 A.H.)
8. ‘Abd Allāh b. Rawāḥa  
(d. 8 A.H.)
9. ‘Abd Allāh b. Salām  
(Medina; d. 43 A.H.)
10. ‘Abd Allāh b. ‘Umar  
(d. circa 73 or 74 A.H.)
11. ‘Abd Allāh b. al-Shakkir Mitrif  
(d., n.d.)

12. 'Abd Allāh b. al-Zubayr  
(Mecca; d. 73 A.H.)
13. 'Abd al-Raḥmān b. Abī Laylā  
(d., n.d.)
14. 'Abd al-Raḥmān b. Abzā al-Khuza'i  
(d., n.d.)
15. 'Abd al-Raḥmān b. 'Awf  
(Medina; d. 31 or 32 A.H.)
16. Abū Bakr al-Ṣiddīq 'Abd Allāh b. Abī Quḥāfa  
(First Caliph; d. 12 A.H.)
17. Abū al-Dardā' 'Uwaymir b. 'Āmir (or Mālik) al-Khazrajī  
(Medina; d. 32 or 37 A.H.)
18. Abū Dharr al-Ghifārī  
(Medina; d. 32 A.H.)
19. Abū Hurayra 'Abd al-Raḥmān b. Ṣakhr  
(Medina; d. 57 A.H.)
20. Abū Mūsā al-Ash'arī  
(Medina and 'Irāq; d. 52 A.H.)
21. Abū Qatāda Ḥārith (or Nu'mān)  
(Medina; d. 54 A.H.)
22. Abū Sa'īd al-Daḥḥāk b. Sufyān  
(Medina; n.d.)
23. Abū Sa'īd Sa'd b. Mālik al-Khudrī  
(Medina; d. 74 A.H.)
24. Abū 'Ubayda 'Āmir b. 'Abd Allāh b. al-Jarrāḥ  
(Mecca and Syria; d. 18 A.H.)
25. 'Ā'isha bint Abū Bakr  
(Wife of the Prophet; d. 58 A.H.)



26. 'Alī b. Abī Ṭālib  
(Fourth Caliph; d. 40 A.H.)
27. 'Ammār b. Yāsir  
(d. 37 A.H.)
28. 'Amr b. al-'Āṣ  
(Medina, Egypt and Syria; d. 42 or 51 A.H.)
29. Anas b. Mālīk  
(Baṣra; d. 90 A.H.)
30. 'Atrīs b. 'Urqūb  
(d., n.d.)
31. 'Attāb b. Asīd  
(Medina and Mecca; d. 23 A.H.)
32. Ḥafṣa bint 'Umar  
(Wife of the Prophet; d. 41 or 45 A.H.)
33. Ḥakīm b. Ḥizām  
(Mecca; d. 54 A.H.)
34. Ḥassān b. Thābit  
(d. circa 40 and 54 A.H.)
35. Ḥāṭib b. Abī Balta'a  
(Medina; d. 30 A.H.)
36. Hind bint 'Utba  
(Wife of Abū Sufyān; d. n.d.)
37. Ḥudhayfa b. al-Yamān  
(Medina and 'Irāq; d. 36 A.H.)
38. Jābir b. 'Abd Allāh al-Anṣārī  
(Medina; d. 78 A.H.)
39. Ja'far b. Abī Ṭālib  
(d. 8 A.H.)

40. Khabbāb b. Aratt  
(Kūfa; d. 37 A.H.)
41. Khadīja bint Khuwaylid  
(Mecca; d. 10 B.H.)
42. Mu'ādh b. Jabal  
(al-Yaman; d. 18 A.H.)
43. Mu'āwiya b. Abī Sufyān  
(First Caliph of Umayyad Dynasty; d. 61 A.H.)
44. Muḥammad b. Maslama  
(d. 43 A.H.)
45. Qubaysa b. al-Mukhāriq  
(Medina and Baṣra; d. n.d.)
46. Rāfi' b. Khadīj  
(Medina; d. 74 A.H.)
47. Sa'd b. Abī Waqqāṣ  
(Medina; d. 55 or 58 A.H.)
48. Sa'd b. Mālīk  
(Medina and Kūfa; d. 56 A.H.)
49. Ṣafwān b. Mu'aṭṭal  
(Sumasāṭ; d. 60 A.H.)
50. Ṣafwān b. Umayya  
(d. n.d.)
51. Al-Sā'ib b. al-Hārith b. Ṣabira  
(Mecca; d. 57 A.H.)
52. Ṣayfī b. 'Ā'idh  
(d. n.d.)
53. Ṭalḥa b. 'Ubayd Allāh  
(Medina; d. 36 A.H.)

54. 'Ubāda b. al-Ṣāmit  
(Medina and Ramalah; d. 34 A.H.)
55. 'Ubayd Allāh b. 'Umar b. al-Khaṭṭāb  
(d. 37 A.H.)
56. 'Umar b. al-Khaṭṭāb  
(Second Caliph; d. 23 A.H.)
57. 'Umrān or 'Imrān b. Ḥuṣayn  
(Baṣra; d. 52 or 53 A.H.)
58. 'Urwa b. Abī al-Ja'd al-Bāriqī  
(d. n.d.)
59. Usāma b. Zayd b. Ḥāritha  
(Damascus and Medina; d. 54 A.H.)
60. Uthmān b. 'Affān  
(Third Caliph, Medina; d. 35 A.H.)
61. Zayd b. Arqam  
(d., n.d.)
62. Zayd b. Aslam  
(d., n.d.)
63. Zayd b. Ḥāritha  
(d. 8 A.H.)
64. Zayd b. al-Khaṭṭāb  
(Medina; d. 12 A.H.)
65. Zayd b. Thābit  
(Medina; d. 45 A.H.)
66. Zaynab bint 'Abd Allāh or Mu'āwiya  
(Wife of 'Abd Allāh b. Mas'ūd; d., n.d.)
67. Al-Zubayr b. al-'Awwām  
(Medina; d. 361 A.H.)



II. The names of the Successors

1. Abān b. 'Uthmān  
(d. 105 A.H.)
2. 'Abd Allāh b. 'Utba b. Mas'ūd  
(d., n.d.)
3. 'Abd al-Mālīk b. 'Abd al-'Azīz b. Jurayj  
(Mecca; d. 150 A.H.)
4. 'Abd Allāh b. Dhakwān Abū al-Zinād  
(d. 130 A.H.)
5. Abū Ja'far Muḥammad b. 'Alī b. Ḥusayn al-Bāqir  
(d. 114 A.H.)
6. Al-Awsad b. Yazīd al-Nakha'ī  
(Medina; d. 75 A.H.)
7. Al-Daḥḥāk b. Muzāḥim  
(d., 102 A.H.)
8. Al-Ḥakam b. 'Utayba  
(Kūfa; d. 115 A.H.)
9. Al-Ḥasan b. Abī al-Ḥasan al-Baṣrī  
(Baṣra; d. 110 A.H.)
10. 'Alī b. al-Ḥusayn  
(d. 94 A.H.)
11. 'Alqama b. Qays  
(d. 62 A.H.)
12. 'Āmir b. Shuraḥīl b. 'Abd al-Sha'bī  
(Kūfa; d. 104 or 105 A.H.)
13. 'Amr b. Dīnār  
(d. 125 A.H.)

14. 'Aṭā' b. Abī Rabāḥ  
(Mecca; d. 114 A.H.)
15. Furūkh  
(The client of 'Uthmān b. 'Affan; d., n.d.)
16. Hishām b. Ismā'īl  
(d., n.d.)
17. Ibrāhīm b. Yazīd al-Nakha'ī  
(Kūfa; d. 95 or 96 A.H.)
18. 'Ikrima  
(Mecca; d. 105 or 107 A.H.)
19. Ma'mar b. Rāshid  
(Ṣa'a'; d. 154 A.H.)
20. Marwān b. al-Ḥakam  
(Fourth Caliph of Umayyad Dynasty; d. 65 A.H.)
21. Masrūq b. al-Ajda'  
('Irāq; d. 63 A.H.)
22. Muḥammad b. 'Amr b. Ḥazm  
(d., n.d.)
23. Muḥammad b. Sīrīn  
(Medina and Baṣra; d. 110 A.H.)
24. Mujāhid b. Jabr  
(Mecca; d. 103 A.H.)
25. Muṣ'ab b. al-Zubayr  
(d., n.d.)
26. Nāfi'  
(Medina; d. 117 A.H.)

27. Qatāda b. Di'āma  
(d. 118 A.H.)
28. Rabī'a b. 'Abd al-Rahmān  
(Mecca; d. circa 136 A.H.)
29. Sa'id b. Jubayr  
(Kūfa; d. 94 or 95 A.H.)
30. Sālim b. 'Abd Allāh b. 'Umar  
(Medina; d. 106 A.H.)
31. Shurayh b. al-Hārith al-Kindī al-Qādī  
(d. 79 or 80 A.H.)
32. Tāwūs b. Kaysān  
(Mecca; d. 105 or 106 A.H.)
33. 'Ubayd Allāh b. 'Abd Allāh b. 'Umar  
(d., n.d.)
34. 'Umar b. 'Abd al-'Azīz  
(d. 101 A.H.)

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35. Abū Ayyūb Sulaymān b. Yasār  
(d. circa 100 or 107 A.H.)
36. Abū Bakr b. 'Abd al-Rahmān b. al-Hārith b. Hishām  
(d. 94 A.H.)
37. Al-Qāsim b. Muḥammad b. Abū Bakr  
(d. 106 A.H.)
38. Khārija b. Zayd b. Thābit  
(d. 99 or 100 A.H.)
39. Sa'id b. al-Musayyib  
(d. 94 A.H.)



40. 'Ubayd Allāh b. 'Abd Allāh b. 'Utba  
(d. 94 or 98 A.H.)
41. 'Urwa b. al-Zubayr  
(d. 92 or 94 A.H.)

III. The early jurists

1. 'Abd al-Rahmān b. 'Amr al-Awzā'i  
(Syria; d. 159 A.H.)
2. Abū Bakr, 'Abd al-Razzāq b. Hammām al-Ṣan'ānī  
(d. 211 A.H.)
3. Abū Ḥanīfa al-Nu'mān b. Thābit  
(Kūfa; d. 150 A.H.)
4. Abū 'Abd Allāh, Muḥammad b. Idrīs al-Shāfi'i  
(Medina, Baghdad and Cairo; d. 204 A.H.)
5. Abū Yūsuf, Ya'qūb b. Ibrāhīm  
(Kūfa; d. 182 A.H.)
6. Hammād b. Abī Sulaymān  
(Kūfa; d. 120 A.H.)
7. Muḥammad b. 'Abd al-Rahmān b. Abī Laylā  
(Kūfa; d. 148 A.H.)
8. Muḥammad b. al-Ḥasan al-Shaybānī  
(Kūfa; d. 189 A.H.)
9. Muḥammad b. Muslim b. 'Ubayd Allāh b. Shihāb al-Zuhrī  
(Medina; d. 124 A.H.)
10. Sufyān b. Sa'īd b. Masrūq al-Thawrī  
(Kūfa; d. 161 A.H.)
11. Zufar b. al-Hudhayl  
(Baṣra; d. 158 A.H.)

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